



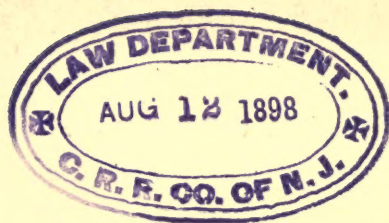
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Pennsylvania, Reports. Supreme Court.
"11

REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

WILLIAM RAWLE, JUN.

WITH NOTES REFERRING TO CASES IN THE SUBSEQUENT REPORTS.

BY

WILLIAM WYNNE WISTER, JUN.,

CONTINUED BY

ELLIS AMES BALLARD.

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JUDGES
OF THE
SUPREME COURT OF PENNSYLVANIA.

JOHN BANNISTER GIBSON,

Chief Justice.

MOLTON C. ROGERS,

CHARLES HUSTON,

JOHN TOD,

FREDERICK SMITH,

} Justices.

AMOS ELLMAKER, Esq., Attorney-General.

PHILIP S. MARKLEY, Esq., (appointed August 17th, 1829,
in the place of AMOS ELLMAKER, Esq., resigned.)

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

MIDDLE DISTRICT—JUNE TERM, 1829.

[SUNBURY, JUNE 25, 1829.]

Dennison *against* Otis.

IN ERROR.

The docket of a justice of the peace, obtained from his office during his absence from the county, and proved to be in his handwriting, is evidence, although no *subpoena* has been taken out to procure his attendance.

ERROR to the Common Pleas of *Susquehanna* county.

On the trial of this cause, which was an action of replevin, brought by Mason Dennison against Israel S. Otis, the plaintiff offered in evidence a book, purporting to be the docket of Samuel A. Brown, Esq., a justice of the peace of *Susquehanna* county, containing, as was alleged, the record of a judgment, obtained by Dennison against Otis before the said justice, together with evidence, that he was absent from the county, and had been so for several weeks; that the said book was found in his office, and that it was in his handwriting. The counsel for the defendant objected to the evidence, and the court rejected it, because no *subpoena* had been taken for the justice, who resided in the county, and was within reach of an attachment.

The rejection of this evidence was now assigned for error by *Case*, who argued, that as a certified copy of the docket would have been admissible in evidence, the original must be.

[Dennison v. Otis.]

[*10] *Mallory, for the defendant in error, answered, that the evidence offered did not establish the fact, that the book in question was the docket of the justice. It might have been a scratch book. To establish the identity of a record, it must be proved by the keeper of it.

The opinion of the court was delivered by

ROGERS, J.—Without doubt, the docket of a justice of the peace is evidence to show a judgment; so, that the single question which we have to determine is, whether the docket was sufficiently proved or identified. The plaintiff offered in evidence a book, purporting to be the docket of Samuel A. Brown, Esq., a justice of the peace, and containing, as was alleged, (and which we are to take as true,) the record of a judgment, Dennison against Otis, accompanied with proof, that the justice was absent from the county, and had been so for several weeks; that the book was found in his office, and was in his handwriting. The testimony was rejected, because no *subpoena* was taken for the justice, who resided in the county, and was, at the time of trial, within reach of an attachment. The Court of Common Pleas, it would seem, had gone on the idea, that no person but the justice himself could prove his docket. We do not consider this to be the law, as it would introduce a strictness in relation to the docket of a justice, which would be attended with great inconvenience in practice. Any person who knows the fact may identify the docket, so far as to lay a foundation for its introduction to the jury, who must ultimately decide; or, circumstances may be shown which afford a reasonable presumption, that the book offered is the docket of the justice. It is admitted, that Brown is a justice of the peace; it was shown that he was absent; the book purported to be his docket, that is, as I understand the offer, it was so labelled, or bore intrinsic marks of being a record of his official proceedings; it was found in his office, and was in his handwriting. Under these circumstances, we would suppose there was no reasonable room for doubt, that it was the docket of the justice; or, at any rate, we can perceive no violation of principle, and but little danger in handing it over to the jury for their inspection. No *subpoena* was issued for the justice, but this is accounted for by the fact, that he was absent from the county. That he was then within reach of an attachment, we think of little consequence, as we consider the testimony of the justice not the only proof of the identity of his docket.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 4 W. & S. 191; 3 H. 124; 9 H. 66; 30 S. 215, s. c. 1 W. N. C. 216.

*[SUNBURY, JUNE 25, 1829.]

[*11]

Fry *against* Jones and Another.

IN ERROR.

On a demise of a grist mill, the lessee to render one-third of the toll, the lessor may distrain for the rent.

ERROR to the Court of Common Pleas of *Northumberland* county.

Replevin by John G. Fry against John Jones and Amos Straw, constable of Augusta township. The defendants avowed for rent in arrear, to which the plaintiff replied, no rent in arrear, and afterwards added the plea of *non demisit*.

On the trial it appeared, that John Jones had demised to John G. Fry, a grist mill, and house, and lot of ground, for the term of one year, reserving as rent "one-third of the toll which the mill grinds," for which Jones, the landlord, had, by a warrant directed to Straw, the constable, required him to distrain; averring in the warrant, that one hundred and sixty and a half bushels of different kinds of grain, amounting in value to seventy-six dollars and fifty-eight cents, remained due and unpaid.

The court charged the jury in favour of the defendants, for whom a verdict was given. A bill of exceptions to the charge having been taken, a writ of error was issued, which was argued by *Donnell*, for the plaintiff in error, who contended,

1. That the pleadings put not only the amount of rent, but the tenancy itself, in issue. The strongest defence was on the plea of *non demisit*. The plaintiff was not a tenant, but a servant, or agent, working on the shares.

2. The plaintiff could not tender the grain in satisfaction of the rent, after the distress. *Warren v. Forney*, 13 Serg. & Rawle, 52. The landlord's warrant was too general, being for different kinds of grain, without distinguishing how much of each.

3. But the main objection is, that on such a demise as this, there cannot be a distress. The third of the toll of a mill cannot be ascertained until an account is rendered by the miller. Distress cannot only be for a certain rent. *Co. Litt.* 142; *Ib.* 96; *Addison*, 347; *Cro. Eliz.* 143; 1 *Salk.* 162. The act of assembly of the 21st of March, 1772, *Purd. Dig.* 710, seems to require the rent to be certain. In the tenth section, the language is, that "it shall and may be lawful for all defendants

[Fry v. Jones and another.]

in replevin, to avow and make cognizance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant, or demise, at such certain rent or service," &c.

Greenough, contra.—The practice in this state has been in accordance with that here pursued, upwards of a century. [*12] Military *service was uncertain, but to shear all the sheep on a certain manor, was good, because it could be rendered certain. 2 Bac. Ab. 342. The case of *Smith v. Colson*, 10 Johnson, 92, is decisive of the general principle.

The opinion of the court was delivered by

ROGERS, J.—The landlord's warrant states a lease of a grist mill, a house, and lot, in Augusta township, Northumberland county, for the term of one year, commencing on the 1st of April, 1825, for the one-third of the toll which the mill grinds, and avers, that one hundred and sixty and a half bushels of different kinds of grain, of the value of seventy-six dollars and eighty-five cents, still remain due and unpaid; and, this appears to have been the contract on which the distress was made. The plaintiff in replevin denies the right to distrain for two reasons; 1st, He contends, that Fry was not the tenant, but the servant of Jones; and, 2d, that the rent is uncertain. It would be extraordinary if the first proposition of the plaintiff in replevin should avail him, as it would destroy tenancy almost altogether in Pennsylvania. In consequence of the fluctuation in prices, such a thing as a fixed rent, either in kind or money, is scarcely known. We have almost always adopted the mode of renting for a share of the produce of a farm, which is preferred by tenant and landlord. If there is an advance of price, or an abundant harvest, both partake of the benefit; and, if the price should be low, or the crop should fail, the tenant avoids ruin. A difficulty has existed in relation to this matter from confounding a cropper with a tenant. If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labour. The possession is still in the owner of the land, who alone can maintain trespass; nor can he distrain, for he does not maintain the relation of landlord and tenant, which is inseparable from the right of distress. Fry was put in possession of the house and mill, lives in the house with his family, and agrees to give Jones one-third of the toll. To say he is not a tenant, is confounding two things which are entirely distinct.

It is said the rent is uncertain, and, therefore, Jones had

[Fry v. Jones and another.]

no right to distrain. In Co. Litt. 96, *a*, the principle which governs this case is clearly stated.

It is a maxim of law, that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty; for *id est certum, quod certum reddi potest*; for, *oportet quod certa res deducatur in judicium*; for, upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet, in some cases, the author says, there may be a certainty in an uncertainty; as, a man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the land has sometimes a greater number, and sometimes a lesser number there; and *yet, this uncertainty being referred to the manor, which is certain, [*13] the lord may distrain for this uncertainty. *Et sic de similibus*. The uncertainty for which distress may not be had, is put by Littleton in the text, such as tenancy in frankalmoigne. And, if they which hold their tenancy in frankalmoigne will not, or fail to do such divine service, (as is said,) the lord may not distrain them for not doing this, &c., because it is not put in certainty what services they ought to do. In commenting on this text, Lord Coke explains what is meant by the uncertainty for which the lord cannot distrain. The services to be performed by a tenant in frankalmoigne, are neither certain, nor can they by any means be reduced to a certainty. They who hold in frankalmoigne, are bound of right before God to make orisons, prayers, masses, &c., and other divine services, not only for the souls of the grantor, or feoffer, but for the souls of their heirs which are dead, and for the prosperity and good life and good health of their heirs which are alive. Co. Litt. 95, *a*, sect. 135. In tenure in frankalmoigne, no mention is made of any manner of service; for none can hold in frankalmoigne if there be expressed any manner of certain service that he ought to do, &c. We hold the principle to be, that a distress is inseparably incident to every service, that may be reduced to a certainty. If that should be the rule, we are at a loss to conceive in what the inconvenience or difficulty consists. If the tenant keeps an account of the toll, which it is his duty to do, the rent may be reduced to the utmost certainty. Nor can we perceive the danger which may arise to the tenant; for his rights are abundantly protected. By an offer to comply with his contract, with which he is best acquainted, he can defeat the landlord. And for an excessive distress, the law, as in other cases, has provided him an ample remedy. The avowry is well enough, nor can the jury have any difficulty in estimating the damages. It is the interest of landlords and tenants, that the rights of the former should be

[Fry v. Jones and another.]

protected. With right of distress unimpaired, a poor man can obtain a shelter and the means of livelihood for his family, which he would otherwise be unable to procure without security, which it would frequently be out of his power to obtain. Experience, which is the best test, satisfies us, that an interference with the remedies provided by the common law, causes mischief rather than good.

Judgment affirmed.

Cited by Counsel, 3 Barr, 184; 8 Barr, 283, 346; 25 S. 201; 1 N. 127; s. c. 3 W. N. C. 144; 9 N. 488; 7 O. 518; s. c. 13 W. N. C. 428.

Cited by the Court, 3 Penn. R. 501; 3 W. & S. 534; 5 W. & S. 163; 3 S. 83; 6 S. 175; 13 N. 116; s. c. 8 W. N. C. 476.

These cases bear out the statement that distress is incident to every lease in which the rent reserved (whether in money or in kind) is certain, or capable of being computed with certainty. *E. g.* The rent reserved was a sum certain and an additional sum for every \$500 worth of improvements put on by the landlord. *Held*, that the rent was certain. *Id certum est quod certum reddi potest* 25 S. 200. The difficulty arises in applying the rule, and in distinguishing between a lessee on shares and a mere cropper. The following was held a lease. "A. agrees to let B. farm . . . for the term of one year . . . and to deliver to the said A. one-half, &c." 6 S. 172. In a later case, 13 N. 113, a lease on shares is distinguished from a partnership.

[*14]

*[SUNBURY, JUNE 26, 1829.]

Penn and Another *against* Preston.

IN ERROR.

The words "intended to be recorded," used in a deed, in reference to a power of attorney, under which the deed purports to have been made, imply a covenant on the part of the grantor to procure the power to be recorded within a reasonable time.

The covenant is not fulfilled in relation to lands in Wayne county, by recording the power in Philadelphia county, unless it be proved, that the grantor also had lands in Philadelphia county, to be affected by the power.

Possession of a farm draws to it the possession of the woodland belonging to it, though not inclosed; and, the party in possession may maintain trespass against a wrongdoer for destroying timber in such woodland.

The description, in a deed from the late proprietaries, of William Penn, as "the eldest son, and heir at law," of Richard Penn, although it might imply, that Richard Penn had other children, is not such a defect of title, as to preclude their recovery of the purchase-money of land sold by them, from one who has been in possession under such a deed for twenty-five or thirty years.

If the grantee has sustained injury, from trespasses and otherwise, in consequence of not being furnished by the grantor with muniments of title, which he was bound to furnish, the court, in an action for the purchase-money, should not instruct the jury to find a verdict for the defendant, but to make a deduction sufficient to cover the injury sustained.

[Penn and another v. Preston.]

WRIT of error to the Court of Common Pleas of *Wayne* county.

The record, which was very voluminous, presented in substance the following case :

Before the revolution, the then proprietaries, by warrant and survey, had appropriated, as part of their proprietary tenths, a tract of land, containing two thousand two hundred and twenty-two acres, on the river Delaware, including the mouth of Equinunk creek, and called and known by the name of the Equinunk manor. This land appeared to have been occupied, and the tillable parts of it cultivated by Preston, the defendant, or by those holding under him, from about the year 1796. In or about the year 1801, Preston also erected a double saw mill on the tract, which he kept employed for about ten years. He had three dwelling houses on the land, but it seems they were occupied by his tenants, not by himself. There was no evidence by what right or claim Preston held the possession, except that Doyle, a witness, swore, that Preston once claimed the land as his own property, in partnership with one Drinker. But in the year 1812, Preston purchased the whole manor, and received a conveyance from John R. Coates, the attorney in fact of the Penns. The deed begins thus :

“This indenture, made the 10th day of March, A. D. 1812, between the Honourable John Penn, of Stoke Pogis, in the county of Berks, in the united kingdom of Great Britain and Ireland, one *of the late proprietaries of Pennsylvania, [*15] by John R. Coates, of the city of Philadelphia, Esq., his attorney, duly constituted by letter of attorney, bearing date 26th of March, A. D. 1804, recorded at Philadelphia, and the Honourable William Penn, eldest son, and heir at law, of Richard Penn, Esq., deceased, who was the brother, and heir at law, of John Penn, deceased, the other of the said proprietaries of Pennsylvania, and Juliana Catharina, the wife of the said William Penn, by John R. Coates, their attorney, constituted by letter of attorney, bearing date the 5th of March, inst., intended to be forthwith recorded, of the one part, and Samuel Preston, of Stockport, in Buckingham township, in the county of Wayne, &c., gentleman, of the other part part—Witnesseth, that in consideration of one dollar in hand paid, and of the further sum of two thousand seven hundred dollars, secured to be paid by bond,” &c.

The deed contained a special warranty against the Penns, and all claiming under them. No part of the purchase-money appeared to have been paid. This suit was brought upon the bond for the two thousand seven hundred dollars. The defence upon the trial was, that the title to the land was defective, and the

[Penn and another v. Preston.]

muniments incomplete : that the power of attorney from William Penn and wife to Coates, never having been recorded in Wayne county, and the words "intended to be forthwith recorded," amounting to a covenant, this covenant had been broken by the Penns very much to the injury of the defendant : that the words of the deed, describing William Penn as eldest son, and heir at law of Richard, proved conclusively, that other sons must be existing with an equal right to the estate : that the neglect to record the power of attorney in Wayne county deprived Preston of all means of protecting the land from intruders and trespassers : that the timber was cut down, fences destroyed, and the whole tract wasted and useless ; and that he, Preston, was nonsuited, and had large costs to pay in numerous suits, brought by him against marauders upon the property. To support this defence, Preston showed the records of seven suits begun by him in the Court of Common Pleas of Wayne county, most of them brought in the year 1817 ; one of them in trespass against William and Joseph White, in which Preston, the plaintiff, was nonpros for want of a declaration. Another suit was an ejectment against one Dalton, in which there was a nonpros, under a rule of court. Five of the suits were ejectments for the land, or parts of it, or trespass for cutting timber, or replevin for timber. These five suits appeared to be all against William Lebar, Jacob Lebar, Daniel Lebar and others. The first, and apparently the principal defendant in them all, was William Lebar. One of these five suits was pending at the time of trial. In the other four, the plaintiff, Preston, was nonsuited. There was proof, that the nonsuits were occasioned by want of the power of attorney, and Preston's inability to deduce his title. [*16] Sundry letters were read, *dated in 1818, 1819, and 1822, showing earnest and repeated applications by Preston to the agent of the Penns for the letter of attorney, or a well authenticated transcript of it, without success. Further, it was proved by Preston, that since 1812, trees had been cut down on the land, much mischief done, and fences destroyed : that thirty years ago, the place was in good order, but now desolate and wasted ; saplings growing on the meadow (said one witness), as big as his arm : that in high water, the rafts from up the creek went through the land and made roads over the fields ; and, that as to timber, there was none left on the manor. William Lebar, a witness for the plaintiffs, denied the cutting the timber, except forty or fifty trees, for which, he said, he had permission from one of Preston's family. William Lebar also swore, and in this he was fully confirmed by one of Preston's own letters, that he, Lebar, had gone upon the land as tenant, with Preston's own assent. Triple, another tenant of Preston, swore, that the

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people landed their lumber, and placed their rafts on the farm, without any permission from Preston ; but that he, the witness, gave some of them permission : that some of them paid him for this permission, and all promised to pay. There was evidence, that Thomas Cadwalader, the present agent of the Penns, had offered to the defendant a deed of confirmation of his title.

The plaintiff's counsel requested the court to charge the jury as follows :—

“1. That there is no covenant in the deed to the defendant for recording the power of attorney mentioned in said deed, in the county of Wayne, and that the intention to be forthwith recorded, mentioned in said deed, was complied with by recording in the county of Philadelphia.

“2. That the letters of attorney authorize a conveyance of land in the city and county of Philadelphia, as well as in every other county in the state, and were legally recorded in the city and county of Philadelphia ; and that an exemplification of the powers of attorney from the records of that county, is evidence in any county in the state.

“3d. That the deed of confirmation, offered by T. Cadwalader, agent of the plaintiffs, would have supplied the place of the powers of attorney, and made the evidence of the defendant's title good from the date of his deed in 1812.

“4th. That the defendant's possession was sufficient to entitle him to recover against all who came in under him, or against a mere trespasser without colour of title.”

The court charged the jury as follows, on the first and second points :—“That the words ‘intended to be forthwith recorded,’ amount to a covenant on the part of the grantors, that the power of attorney therein mentioned, should be recorded within a reasonable time, and in the proper office : That as there was no proof, either by the exemplification itself, or otherwise, that the grantors owned any real estate which could be affected by the power, *situate in Philadelphia city or county, getting [*17] the power recorded in the recorder's office of the city and county, was insufficient, and no compliance with the covenant.”

The third point was answered by the court fully in the affirmative.

On the fourth point, the court charged, “that the defendant's possession was sufficient to entitle him to recover against all who came in under him, and against a mere trespasser, who came in without colour of title, for trespasses done to his inclosures and improvements, whilst he was in actual possession ; but for trespasses upon the tract of land not included within his

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inclosures and improvements, he could not recover without evidence of title."

The court further charged the jury, "that from the description of William Penn, in his deed to the defendant, as the eldest son, and heir at law of Richard Penn, it was plainly to be inferred, that Richard Penn left other children living at the time of his death, and who were still living at the time of the execution of the said deed, and who were severally entitled, under the laws of Pennsylvania, to an equal share with the said William Penn, of the land mentioned in the said deed." The court further instructed the jury, "that notwithstanding the offer of the plaintiffs, by their counsel, that a deduction should be made from the plaintiffs' demand, to the amount of the moneys actually expended by the defendant in prosecuting his claims for the recovery of the land and trespasses thereon, and which occurred in consequence of the want of evidence of the powers of attorney, by virtue of which, the deed to the defendant was executed; and, their further offer, to receive a verdict, after such deduction, with the condition annexed, that no execution should issue until evidence of the powers of attorney should be produced to the court; if the jury believe, from the evidence, that the defendant has been, and still is kept out of possession of the premises, in consequence of a defect in his title; that the timber has been destroyed, the fences and other improvements ruined, and the whole land rendered of little or no value by persons unauthorized by the defendant; that the defendant could not prevent such general waste and mischief, and that he expended large sums of money in prosecuting for such injuries, and failed in consequence of his title being defective, then justice would seem to require, that their verdict should be in favour of the defendant."

The plaintiff's counsel excepted to the charge, and now assigned the following errors:—

1. That the court erred in charging the jury, that the deed from the plaintiffs to the defendant, contained a covenant, that the power of attorney from William Penn, should be recorded within a reasonable time, and that the said covenant, if any, was not complied with by recording it in the county of Philadelphia.

2. That the court erred in their answer to the fourth point, particularly in saying, that the defendant could not recover, [*18] without *evidence of title, for trespasses committed on the tract of land not included within his inclosures and improvements, even against a trespasser without colour of title.

3. That the court erred in saying, that the title of the defendant was defective from the recital of William Penn as the

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eldest son, and heir at law of Richard Penn, and that this was a ground of defence in the present suit.

4. That the charge was incorrect and uncertain in this, that the court did not leave it to the jury to determine to what amount, if any, the consideration had failed; but assumed, that if the jury believed certain facts, then the failure of consideration, and the defendant's loss and damage were so great as to amount to a defence to the plaintiff's whole demand, and entitle the defendant to a verdict.

Conyngnam and *Mallory*, argued for the plaintiffs in error.

They cited the following authorities: 1 Selw. N. P. 463, 465; *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; 3 Stark. Ev. 1436, 1437; *Miller v. Shaw*, 7 Serg. & Rawle, 129; *Cluggage v. Lessee of Duncan*, 1 Serg. & Rawle, 118; *Farley v. Lenox*, 8 Serg. & Rawle, 398; *Royer v. Benlow*, 10 Serg. & Rawle, 305; *M'Coy v. Dickinson College*, 5 Serg. & Rawle, 254; *Harker et al. v. Birkbeck et al.*, 3 Burr. 1563; *Mather v. Trinity Church*, 3 Serg. & Rawle, 511; *Stambaugh v. Hollabaugh*, 10 Serg. & Rawle, 365; 3 Am. Dig. 492, pl. 11 and 3; 2 Selw. N. P. 1226, 1227; *Hyatt v. Wood*, 4 Johns. Rep. 150; *Byrne v. Vanhoesen*, 5 Johns. Rep. 66; *Penn v. Penn's Executors*, 2 Yeates, 550.

Dennison and *Williston*, argued for the defendant in error, and cited, *Hyatt v. Wood*, 4 Johns. 150; *M'Coy v. Dickinson College*, 5 Serg. & Rawle, 254; *Miller v. Shaw*, 7 Serg. & Rawle, 129.

The opinion of the court was delivered by

TOD, J.—The court below decided rightly, I think, that the words, "intended to be recorded," imply a covenant on the part of the grantors, to procure the letter of attorney to be recorded in a reasonable time. But was the recording in the office at Philadelphia sufficient? I think not, unless there was in the city or county of Philadelphia, real estate of the grantors to be affected by the power. *Leazure v. Hillegas*, 7 Serg. & Rawle, 313, and *M'Keen v. Delancy*, 5 Cra. 22, show, that a copy of a deed is evidence, when taken from the recorder's office of the county in which only a part of the land lies that is comprehended in the deed. But there was not shown to be any real estate in Philadelphia subject to the power; and, the existence of such estate, was not a fact of which there could be any sufficient legal notoriety, without some proof. The court below was clearly right throughout this first head.

2. But I think that the second allegation of error is sustained,

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and that Preston, for all the trespasses committed on his land, might well recover without producing any paper title whatsoever. He had been for twenty-five years in full possession.

[*19] But all this length *of time was not wanted. Possession itself, is a title against a wrong-doer. I refer to the cases cited in the argument. See also 6 Com. Dig. Trespass, B. 2. Intruder on the king's possession may have trespass. In *Weidman v. Kohr*, 13 Serg. & Rawle, 22, Duncan, J., lays down the short conclusion of the law on this subject, "That where a plaintiff is in actual possession, the defendant cannot give a title in a third person in evidence. He may justify, by command of the owner, but such a command is traversable." In this case, beyond a question, the possession was such as to comprehend the timber, though not inclosed. I hold, that there is no usage of the country, nor rule of the common law, nor any reason requiring a man to inclose his timber land; and that, for any possible purpose that can be named, the woods belonging to a farm are as well protected by the law without a fence as with one. No doubt, there must be frequent cases, in which the production of title is necessary to show the extent of possession. But here there seems no pretence from the evidence, to say, that the boundaries of the Equinunk manor were unknown or doubtful. Besides, William Lebar, the principal defendant in the five suits, had been placed on the land by Preston himself, after he had purchased from the Penns. Clearly then, as to Lebar, no title could be wanted to support ejectment by a landlord against his tenant. But whether the landlord could recover in trespass, while Lebar was in the actual legal possession is another matter.

3. The defect in Preston's title, arising from the description in the deed of William Penn, as eldest son, and heir at law. I think this assignment of error is also sustained. Certainly the terms, eldest son, and heir at law, might imply that he was not the only child. Some explanation of the meaning could, perhaps, easily have been given in the recital; for I believe, that during forty years past and more, the general practice has been, in proprietary deeds, to describe one or another of the grantors in the same language, as eldest son, and heir at law. We have all witnessed numerous objections to the form and substance of deeds. This objection is, perhaps, made for the first time in the present case. It is not even alleged, there is any real difficulty of title. Preston has been in possession twenty-five or thirty years, and has never heard of any claimant in opposition to William or Richard Penn. It would appear exceedingly hard to permit him to withhold the purchase-money on account of a

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supposed flaw in the wording of a deed which he accepted and held for a long time without any objection.

As to the fourth assignment of error, it is not easy to discover any just and legal principle, upon which the damages sustained could be made to amount to the sum total of the purchase-money of the land, even supposing all the points of defence to have been made out. A small expense, and any reasonable diligence, would have enabled Preston to obtain the original letter of attorney, or an authenticated copy, with evidence to sustain it, or proof of the contents, *if the instrument itself had been [*20] lost. And of the timber left on the tract by Preston's saw mill, suppose one hundred, or two hundred, or even five hundred trees had been gleaned by Lebar and others, in the capacity of trespassers instead of tenants, and that no redress could be had by law for these outrages, solely for want of recording the power of attorney, yet, it would seem most unreasonable, that the whole manor should go to the defendant and his heirs forever, to indemnify against a temporary loss of some of the products. Probably, the tenants have paid more attention to their own interest than to the interest of their landlord. Mr. Preston knew when he purchased, as well as he does now, that land at the outlet of the Equinunk, must continue subject to the little annoyances of rafts and raftsmen; and, that the fences must suffer by high water, or otherwise. He ought also to have known, and probably did know, that law suits neglected, will produce costs and vexation about as readily as a meadow neglected will produce saplings; and, that there must be many losses which the vendor of land can never be justly made to pay for.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 Wh. 345; 5 Wh. 61; 9 H. 141; 12 N. 460.

Cited by the Court, 5 W. 180; 27 S. 258; s. c. 1 W. N. C. 540.

In like manner, it has been held that a clause in a deed by a debtor, "for the use of said debts," and referring to a schedule of debts, made the deed an assignment for creditors: 5 W. & S. 36; and a mortgage of warranted land "to be surveyed" implies a covenant to survey: 27 S. 258.

[SUNBURY, JUNE 26, 1829.]

Frick *against* Patton.

CERTIORARI.

A *certiorari* does not lie to a justice of the peace, to remove proceedings had before him, under the act of assembly of the 13th of April, 1807, in relation to stray cattle.

ROBERT PATTON had instituted proceedings before William Nesbit, Esq., a justice of the peace of Northumberland county, under the act of assembly of the 13th of April, 1807, to recover damages for an injury asserted to have been done to his premises by stray cattle. The proceedings before the justice were conceived by the defendant, Henry Frick, to be erroneous, and he took out a *certiorari*, to remove them to this court.

Marr, on behalf of the defendant below, now moved to quash the writ, on the ground, that this court had no jurisdiction, and referred to the twenty-fourth section of the act of assembly of the 20th of March, 1810. *Purd. Dig.* 459.

J. Hepburn, contra, cited, *The Commonwealth v. Fourteen Hogs*, 10 Serg. & Rawle, 393; *M'Call v. Lennox*, 9 Serg. & Rawle, 302.

PER CURIAM.—The prohibitory section of the act of assembly of 1810, is as general as words can make it. “No writ of *certiorari* *issued out of the Supreme Court, to any justice [*21] of the peace in any civil suit or action, shall be available to remove the proceedings had before such justice.” What is the nature of the proceeding in the case of strays? It is a species of attachment to compel the owner to appear and make satisfaction for trespass committed by his cattle; and, after appearance had, if satisfaction be not tendered and accepted, the proceeding assumes the ordinary form of an action *inter partes*, the justice giving judgment according to the limit of his jurisdiction, and issuing execution for the damages, and the defendant having the benefit of stay of execution and appeal, as in other cases. The case of the fourteen hogs, 10 Serg. & Rawle, 393, which is cited in support of the writ, passed, as to the present question, *sub silentio*; and, *M'Call v. Lennox*, 9 Serg. & Rawle, 302, was the case of an inquisition before two justices; in which respect, it is essentially different from the case at bar,

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which falls within both the letter and the spirit of the prohibition.

Certiorari quashed.

Cited by Counsel, 8 H. 434.

Explained 26 S. 469, where it was decided that a proceeding before a justice to enforce a penalty under the Road Laws, is also a civil action.

[SUNBURY, JUNE 29, 1829.]

Bellas, Esq., *against* Levy, Esq.

IN ERROR.

A court of error will not examine into the merits of a report of referees, under the act of assembly of 1705, which has been confirmed by the court below.

Costs may be given under the statute of Gloucester, by the court to which a report of referees is made, though not found by the referees.

THIS was an amicable action on the case, entered in the Court of Common Pleas of *Northumberland* county, for the purpose of settling an account between Daniel Levy, Esq., the plaintiff below, and Hugh Bellas, Esq., the defendant below. The cause was submitted to referees under the act of assembly of 1705.

It appeared, from the evidence given by the referees on the hearing of exceptions filed to their report, that Mr. Bellas, as prothonotary, and Mr. Levy, as late prothonotary, had received each other's costs, and an open, unsettled account went on between them from the year 1814, until the institution of this suit, to April Term, 1825. Mr. Bellas kept a book of entries, but Mr. Levy kept none. Mr. Bellas marked what he received on the dockets of the court, but Mr. Levy did not. Mr. Bellas rendered various successive accounts to Mr. Levy, and paid him the balances appearing to be due upon them, to which no objection was made. They showed nothing to be due to Mr. Levy. No account was ever rendered by Mr. Levy to Mr. Bellas, until just before the institution of a former suit in 1823. No demand was ever made by Mr. Levy, nor was any *promise to pay [*22] ever made by Mr. Bellas; both parties being ignorant of the true state of the account between them, and whether any balance was due on either side.

The plaintiff's claim was originally six hundred and eighty-six dollars, about half of which had been paid long previously. Before the referees it was reduced to three hundred and forty-

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six dollars, and by various credits, and costs belonging to the defendant, received by the plaintiff, the balance was further reduced to one hundred and forty-one dollars and forty-four cents. Upon this sum the referees allowed seventy-six dollars and thirty-two cents interest, but no costs. The costs amounted to about sixty dollars. The court entered judgment for principal, interest, and costs, and the defendant took a writ of error.

Merril, for the plaintiff in error.

1. Interest ought not to have been allowed on an unliquidated account. The defendant below was a trustee, and ready to pay over, and no demand was made upon him before the commencement of the action. There was no vexatious withholding of the money. Neither the plaintiff nor the defendant knew of the existence of the action. *Williams v. Craig*, 1 Dall. 316; *Knight v. Reese*, 2 Dall. 182; *Newell v. Griswold*, 6 Johns. Rep. 45; 12 Johns. Rep. 156.

2. The court ought not to have given judgment for costs. They had no right to go beyond the award, and the referees did not give costs; 4 Am. Dig. 43; 1 South, 173; *Buckley v. Ellmaker*, 13 Serg. & Rawle, 71.

Donnel and *Lachells, contra*, referred to *Harker v. Elliott*, 7 Serg. & Rawle, 284, and *Gratz v. Phillips*, 14 Serg. & Rawle, 151, to show, that this court will not, on a writ of error, examine the proceedings of the referees, and go into the merits of the award, if it be good on its face. But the rule, with respect to interest, they said, was well settled. It is allowed where one man has had the use of money belonging to another, and the matter is confided to the jury under all the circumstances of the case. *Brown v. Van Braam*, 3 Dall. 349. If a factor do not remit with due diligence, he is chargeable with interest. *The People v. Gasherie*, 9 Johns. Rep. 71. Interest is allowed upon an open account, where there has been unreasonable and vexatious delay. *Williams v. Craig*, 1 Dall. 316. It was the duty of the defendant below to furnish the account, and show the balance due. In *The Lessee of Dilworth v. Sinderling*, 1 Binn. 494, interest was allowed on money lent in advance, and it is the same in this case, as if the money had been lent. They also cited, *Eckert v. Wilson*, 12 Serg. & Rawle, 398; 1 Nott & McCord, 395.

2. In respect to the costs, it was not necessary for the referees to find them expressly. Their award was not at common law, but one which is placed on the footing of a verdict, which need not find costs expressly.

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*PER CURIAM.—It is impossible to distinguish this case from *Cunningham v. Irwin*, 7 Serg. & Rawle, 247, and [*23] *Gratz v. Phillips*, 14 Serg. & Rawle, 144, in which a report of referees, under the act of assembly of 1705, like a verdict, was held to be subject to the legal discretion of the court. Here the question of interest being a question of damages, depending on the peculiar circumstances of the case, presents no point for the legitimate consideration of a court of error. But in *Gratz v. Phillips*, it was determined that such a report cannot be touched here, although it depend on both fact and law. The question of costs, which arises on the face of the report, is properly determinable here; but, as this is not a reference at common law, the right to costs does not depend on the submission or the special terms of the award, but on the statute of Gloucester.

Judgment affirmed.

Cited by Counsel, 5 R. 337; 2 Penn. R. 491; 3 Penn. R. 532; 9 S. 188.

A report of referees may be examined into and set aside on the ground of collusion and fraud: 9 S. 188.

[SUNBURY, JUNE 30, 1829.]

Cummings and Another *against* Lebo.

IN ERROR.

A declaration setting forth, that the defendant bound himself not to do a particular act, when it is manifest that he intended to bind himself to do that act, being amendable in the court below, will be considered by this court as actually amended.

ERROR to the Court of Common Pleas of *Northumberland* county.

In the court below, Daniel Lebo brought an action of debt on a bond given by John Cummings and Isaac Wertz, in the sum of four hundred dollars, and in the declaration set forth, that the condition of the bond was, that if John Cummings, who was then under arrest under a *capais ad satisfaciendum*, at the suit of the said Daniel, should not be and appear at the next Court of Common Pleas for Northumberland county, to take the benefit of the insolvent laws, &c., then the bond should be void. A verdict and judgment were given for the plaintiff.

On error, it was argued by *Bellas*, that the judgment ought to be reversed, because the declaration sets forth no cause of action; the breach assigned being, that the debtor did not appear at the Court of Common Pleas, to take the benefit of

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the insolvent laws, which was the very thing he had undertaken not to do. This is the case of a surety against whom there can be no intendment. 11 Serg. & Rawle, 130; 14 Serg. & Rawle, 105.

Lashells, contra, was stopped by the court.

PER CURIAM.—Justice, convenience, and common sense, require that this exception should not prevail. Equity would [*24] reform such *a bond as is here set out, on the intrinsic evidence of mistake, which it bears on its face. The condition is not to appear, and it is in principle exactly the case of the promissory note mentioned by Lord Hardwicke, 2 Atk. 31, in which the borrower promised never to pay. The plaintiff ought to have declared on the instrument according to its legal effect; so that, whether the bond contain the objectionable word or not, the defect in the declaration, being equally the effect of accident, and amendable below, is to be considered as actually amended here.

Judgment affirmed.

Cited by the Court, 7 C. 471.

[SUNBURY, JULY 3, 1829.]

Hays *against* Lusk.

IN ERROR.

A sealed bill, given by a party in the custody of a constable, for the purpose of settling a proceeding against him on a charge of killing some of his neighbour's cattle, is good, if no fraud or misrepresentation have been used.

If the bill express, that it is to be paid at a given time, if the obligor "cannot make it appear, that no person else committed the trespass," it does not throw the burden of proof on the obligee.

ERROR to the Court of Common Pleas of *Lycoming* county.

The circumstances of this case are so fully developed in the opinion of the court, that a further report is deemed unnecessary.

Armstrong and *Anthony*, for the plaintiff in error.

Campbell, for the defendant in error.

The opinion of the court was delivered by

SMITH, J.—The action was originally brought by the plaintiff in error against the defendant, before a justice of the peace, who had rendered a judgment for the plaintiff, from which the defendant appealed to the Court of Common Pleas of Ly-

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coming county. On the trial in that court, the plaintiff, in support of his action, gave in evidence two due bills from the defendant and one John Reed to him; one in the following words :—

“Due to the order of John K. Hays, the sum of thirty dollars, on or before the first day of December next, provided the said Lusk cannot make it appear, that no person else committed the trespass, with interest from this date. Given under our hands and seals this 14th day of August, A. D. 1823.”

The other bill was in the same words, except that it was dated the 13th of August, 1823, for thirty dollars, payable on or before the 1st of April, 1824, with interest from its date. The pleas were *nil debet*, and payment, with leave to give the special matter in *evidence. Replications and issues. [*25] On the 11th of December, 1827, a trial was had, and a verdict and judgment were rendered for the defendant. Before verdict, the plaintiff's counsel excepted to the charge of the court, and requested that the same might be filed of record. The defendant, under the issue upon the plea of payment, proved that he was under an arrest on a *capias* at the suit of the plaintiff, in an action of trespass for the shooting and killing some of the cattle of the plaintiff, and that while he was so, the constable conversed with him, in a way calculated to intimidate him, stating that he had better settle with the plaintiff, who would not be hard with him, and that the charge would be proved upon him; that the plaintiff, at the same time, had declared, he believed he could prove it; and, that he, the defendant, at all times, denied the charge. The court, thereupon, among other matters, charged the jury, that “bonds, or bills under seal, generally speaking, import a consideration; but, in this case, as well as in many other cases which have happened, the burden of proof of consideration is thrown upon the plaintiff. To these notes a condition is annexed, so unreasonable, that the defendant was not obliged to perform it in avoidance of the single bills, but it became the plaintiff to give some evidence or proof of the defendant killing the cattle.”

In this, the plaintiff alleges, that the court erred, and has assigned it for error here. It is true, and the law was so far correctly laid down, that bonds, or bills under seal, import a consideration; but, in our opinion, the court erred, in stating to the jury, that in this case the burden of proof of consideration was thrown upon the plaintiff. There is nothing in this case to take it out of the general rule. The defendant was charged with a trespass, in killing the plaintiff's cattle, and a suit had been

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brought against him for it. On their way to the justice, the plaintiff alleged, he could prove his cause of action, which the defendant denied; it was, therefore, a controversy about a doubtful matter; a risk was to be encountered by each party, and must have been taken into consideration by both. At length a compromise was proposed by the defendant, into which the plaintiff signified his readiness to enter; an agreement or compromise was actually entered into and made, and in consequence thereof, the bills single were sealed and delivered by the defendant, and a surety to the plaintiff. Clearly this contract was valid, if there was no concealment, or unfair dealing by the party in whose favour the compromise is supposed to operate; and, to this effect was the decision of this court in *Perkins v. Gay*, 3 Serg. & Rawle, 332. There was no concealment, or unfair dealing that I can perceive on the part of the plaintiff. The compromise then, being of a doubtful suit, formed a sufficient consideration, for the single bills of Lusk and his surety to Hays. I admit, that if, on the trial of the cause, Lusk had shown, to the court and jury, that some other person had committed the trespass, it would have availed him, for it would have satisfied any court of [*26] justice, and jury, that the payment *of the bills ought not to be enforced. But, on the issue joined upon the plea of payment, the burden of proof lay upon the defendant, and not on the plaintiff, as the court below supposed. The bills single, on the face of them, imported a consideration; and, the proof, that they had been passed by the defendant to the plaintiff for an actual consideration, was by no means thrown upon him nor was it incumbent on him to prove, that the defendant had destroyed the cattle. The court, therefore, were in an error, when they stated, "that the burden of proof of consideration was thrown upon the plaintiff." It is evident to me, that James Lusk entered into a solemn agreement with John K. Hays, to compensate him by these bills, for a serious injury committed on his property; that he compromised with him for this injury, made the agreement with his eyes open, well knowing his rights, (at least none were concealed from him); and he, therefore, must be supposed to have been acquainted with the consequences which the law would impose on him. Agreements are not to be set aside on slight grounds; indeed, it would be most mischievous to do so. We think, that as the court required the plaintiff, before he could recover on the bills, to prove that the defendant had killed the cattle, they erred. The judgment must, therefore, be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 9 W. & S. 70.

[SUNBURY, JULY 3, 1829.]

The Overseers of the Poor of Point Township, Northumberland County, *against* The Overseers of the Poor of Lycoming Township, Lycoming County.

IN ERROR.

The settlement of a pauper can only be decided by two justices, or a Court of Quarter Sessions on an appeal. It cannot be collaterally determined in an action before a single justice, or in a court of law.

ERROR to the Court of Common Pleas of *Lycoming* county.

The case was argued by *Armstrong* and *Campbell*, for the overseers of the poor of Point township.

Anthony and *Ellis*, for the overseers of the poor of Lycoming township, were stopped by the court.

The whole merits appear so distinctly in the opinion of the court, that the insertion of that opinion alone, is deemed sufficient.

The opinion of the court was delivered by

HUSTON, J.—This was a suit brought before a justice of the peace to recover money expended in the support of Charles —, a *coloured man, who, it was alleged, had a settlement in Lycoming township. He was thrown from a horse in [*27] Point township, and much injured, and his settlement not being known, an order for relief was obtained, directed to the overseers of Point township. His support, and a doctor's bill were demanded from the overseers of the poor of Lycoming township, who refused to pay. A suit was commenced before a justice of the peace, who gave judgment for the plaintiff. The overseers of the poor of Lycoming township appealed to the Court of Common Pleas. The cause was then referred to arbitrators. The overseers of the poor of Lycoming township again appealed; and, on the trial of the cause in court, it was decided, that the plaintiff township had mistaken the remedy, and could not recover, and this is the alleged error.

The twenty-seventh section of the act of assembly, for the relief of the poor, &c., passed the 9th of March, 1771, provides, That if any poor person shall come out of any other borough, township, &c., &c., and shall fall sick or die before he or she have gained a legal settlement in the city, &c., to which he or she shall come, so that such person cannot be removed, the overseers of such place shall, as soon as conveniently may be, give

[The Overseers of the Poor of Point Township, Northumberland County, v. The Overseers of the Poor of Lycoming Township, Lycoming County.]

notice to the overseers of the poor where such person had gained last a legal settlement, &c. ; and, if the overseers of the last-mentioned place, to whom such notice shall be given, shall neglect, or refuse to pay the moneys expended for such poor person, and to take order for relieving such poor person, in case of his, her, or their death, before notice can be given as aforesaid, shall, on request being made, refuse to pay the moneys expended in maintaining and keeping such poor person, then, and in every such case, it shall be lawful for any two justices of the peace of the city or county where such poor person was last legally settled, and they are hereby authorized and required, upon complaint made to them, to cause all such sums of money as were necessarily expended for the maintenance of such poor person during the time of his or her sickness, or for his, or her burial, by warrant under their hands and seals, to be directed to some constable of the city or county respectively, to be levied by distress and sale of the goods and chattels of the overseers of the poor so neglecting or refusing, to be paid to the overseers of the poor of the city or place where such poor person happens to be sick, or die, &c., &c. Provided, that if any of the said overseers shall think him, or themselves aggrieved, by any sentence of such justices, or by their refusal to make any order as aforesaid, he, or they, may appeal to the justices of the peace at the next Court of Quarter Sessions for the county where such justices reside, and not elsewhere, who are hereby authorized and required, to hear and finally determine the same.

From the whole of our laws, two justices, or, on appeal, the Quarter Sessions, are to determine whether a person has any [*28] legal *settlement, and if so, where it is. It never could, then, be intended, that a single justice, or arbitrators, should decide where a man's last legal settlement is. But, this case could not be decided until it was admitted or settled, by competent authority, that his legal settlement was, or was not, in Lycoming township.

The act is plain, the directions are not easily misunderstood, and must not be disregarded, especially as we find the words, "and not elsewhere," in this part of the law. The decision of the court was right. The remedy provided by law must be resorted to ; and, if redress is the right of Point township, it must be obtained in the way pointed out in the act of assembly.

Judgment affirmed.

Cited by Counsel, 10 N. 406, 410 ; s. c. 8 W. N. C. 38.

[SUNBURY, JULY 3, 1829.]

Sloan *against* Hanse.

APPEAL.

To effectuate the intention of the testator, "or" may be construed "and."

Devise to A. and B., or to their heirs. B. at the time of making the will was dead, of which the testator was ignorant. Held, that the devise to B. had lapsed, and the testator's heir at law was entitled to recover.

APPEAL from the decision of Smith, J., at a Circuit Court held at Williamsport, *Lycoming* county, April 25th, 1829.

John Sloan brought a writ of partition against Joseph Hanse, with notice to the terre-tenants. The defendant pleaded *non tenent insimul*.

The following case was made for the opinion of the court:—"It is hereby agreed, that the will of George Sloan, deceased, is a part of the case: [The will, so far as relates to the present controversy, was in these words:—'I give, devise, and bequeath unto my two cousins, Richard Hanse, and Joseph Hanse, of West Whiteland township, Chester county, all my estate, both real and personal, to be equally divided between them, or to their heirs.'] That Richard Hanse, one of the devisees therein named, was dead at the making of the will; having died without issue, unmarried, leaving brothers and sisters: That the death of the said Richard Hanse was unknown to the testator at the making of the will: That John Sloan, the plaintiff in the cause, is the only brother of the said George Sloan, deceased, who died unmarried, without issue and without any sisters. If the court should be of opinion, that the devise to Richard Hanse is lapsed, judgment to be entered for the plaintiff; if of a contrary opinion, the judgment to be entered for the defendant."

*His Honour gave judgment for the plaintiff, and the defendant appealed from his decision. [*29]

The case was argued by *Armstrong* and *Campbell* for the appellant, and by *Anthony* and *Lewis*, for the appellee.

Arguments for the appellant.

Two points may be conceded without prejudice to the claims of the heirs of Richard Hanse. 1. That it is not a case of joint tenancy; and, 2. That the general rule is, that if the devisee dies before the testator, the devise is void; but, the present case steers clear of both these points. The testator, plainly intend-

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ing, that his brother John should take no part of his estate, real or personal, devises the whole of it to his two cousins, Richard and Joseph Hanse. In modern times, the intention of the testator, collected from the whole of the will, and giving effect, if possible, to every word contained in it, has been uniformly adopted as a standard rule of construction, unless the estate thereby created is irreconcilable with the rules of law. The intention of George Sloan, in forming the present will, is manifest. He did not intend that the devise to his two cousins, or to either of them, should lapse by their deaths in his lifetime. The words, "or to their heirs," distinctly show this intention. If a testator expressly directs, that a legacy, or devise, shall not lapse by reason of the death of the first taker, and at the same time uses words indicating who shall take in that event, his will shall be enforced and carried into effect. *Sibley v. Cook*, 3 Atk. 572, is a case of this kind. The words, "or to their heirs," are manifestly introduced not to denote the quantity of estate devised. The word estate, carried the fee without the addition of the word heirs. *Morrison v. Semple*, 6 Binn. 94. But, they are used to show who should take the land devised, if the devisee named in the will should be dead, or die before the testator. The word, "to," is significant, and must not be disregarded. Every word should have effect if possible. It here signifies, that the land shall go over to the heirs as a *descriptio personarum*. They will take as purchasers, not through the decedent, but by way of remainder after him. Immediately on Richard's death, Joseph Hanse and his sister thus became entitled to what was devised to him. They were his heirs, and there was no other disposition of the property made by the testator in the event of Richard's death, than that they should take. But it is contended, that the word "or" should be construed "and." That courts have a power so to alter the text of a will is certain; but, as said in 1 Yeates, 319, it can only be done in cases where it is absolutely necessary to support the evident meaning of the testator. But words cannot be arbitrarily expunged or altered. In no case will courts allow a substitution of words, or a construction of them, tending to destroy a will wholly, or in part, instead of supporting it. In 14 Serg. & Rawle, 92, it is laid down, that the meaning of every word must be weighed in the sense the testator used it. The reason of a devise lapsing by [*30] the death of the devisee in the testator's life, is given in 2 Bac. Ab. 86. Devise to A. and his heirs. A. dies in the lifetime of the testator; the heir of A. shall take nothing, for the heirs of A. are named only to express the quantity of estate that A. shall take. Thus, the reason for the lapse of the devise is given, and it is clearly distinguishable from the case

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before us. *Sword v. Adams*, 3 Yeates, 34, is of the same purport, and governed by the same reasons. *Ware v. Fisher*, 2 Yeates, 578, agrees in principle; and, *Patterson v. Hawthorn*, 12 Serg. & Rawle, 112, is much in point. The testator directed that the price of his land should be divided among his children, or their heirs, after the death of the mother—one of the daughters died before the mother. It was held, that the husband of the deceased daughter, as her administrator, was entitled to recover the legacy. Tilghman, C. J., says, "I understand these words as if the testator had said,—to be paid to them, or to such persons as would be entitled to it as their representatives, by the laws of the country." It is urged, that where the intention is doubtful, the heir at law must prevail; but in this case, there can be no doubt of the intention.

The following cases were also cited by the defendant's counsel:—*Steele v. Thompson*, 14 Serg. & Rawle, 104, 1 Vez. 25; *Robinson v. Lessee of Adams*, 4 Dall. Appendix, 12; *Lessee of Griffith v. Woodward*, 1 Yeates, 319; 2 Atk. 86; *Dickinson v. Purvis*, 8 Serg. & Rawle, 71; *Craighead v. Given*, 10 Serg. & Rawle, 353; *Lessee of Caldwell v. Ferguson*, 2 Yeates, 380 · 1 Eq. Ca. Ab. 231.

Arguments for the appellee.

The plaintiff is brother, and heir at law of the testator, and claims the share devised to Richard Hanse, as a lapsed devise. No arguments to be drawn from the doctrine of survivorship in joint tenancy can avail, as the will was made since the act of the 31st of March, 1812, abolishing joint tenancy, and the words, "equally to be divided," rendered the devise in question a tenancy in common, by the common law. *Evans v. Brittain*, 3 Serg. & Rawle, 135. Joseph Hanse cannot claim as heir to his brother Richard, because in that case, he must make his claim through his brother Richard; who, not being *esse*, at the time of the testator's death, could take no estate under the will, and, therefore, could transmit none to his heir. *Busby v. Greenslate*, *Strange*, 445; *Hodgson v. Ambrose*, Doug. 337. It has been long established, and has become a rule of property, that the word heirs, in devises of this nature, is a word of limitation, and not of purchase. Co. Litt. 376, Note 1 of Butler; Ib. 381. No point is better settled, says his Honour Judge Yeates, than "that a devise of land, or personalty, to a person who dies in the testator's lifetime, becomes thereby lapsed, by the general rules of common law." *Weishaupt v. Brehman*, 5 Binn. 118. The authorities in support of this position are almost numberless.

The case cannot be taken out of the general rule, by the in-

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introduction of the disjunctive "or," instead of the conjunctive ["*31] "and;" *because, even Joseph Hanse, the defendant, before he can entitle himself to any share of the property devised, must ask to have the word "or" converted into "and." Unless this construction be given, nothing passes by the will. It would be void for uncertainty. No court could carry into effect a devise to A. or to B.; for it would be impossible to determine which of the persons named, was the object of the testator's bounty. If a man gives land to one, to have and to hold to him, or his heirs, he hath, says Sir Edward Coke, "but an estate for life for the uncertainty." Co. Litt. 8. But, in the case of a devise, the courts, where it appeared necessary to prevent the gift from being void, and to carry the testator's intention into effect, have uniformly construed the disjunctive "or," into the conjunctive "and," and *vice versa*, *Caldwell v. Ferguson*, 2 Yeates, 380. Devise to Hugh M'Fadden, now in Ireland, or his heirs, was construed to mean, Hugh M'Fadden and his heirs. See also 6 Cruise, 183; Lessee of Hauer v. Sheetz, 2 Binn. 532; *Holmes v. Lessee of Holmes*, 5 Binn. 253; Lessee of Cheesman v. Wilt, 1 Yeates, 411; 2 Mass. 554; *Barker v. Suretees*, Strange, 1175. There is a clear distinction between those cases where the legatee dies before the testator, and where, after the death of the testator, the legatee dies before the period, or contingency, on the happening of which, the legacy is to be paid. Where there is a person in esse, to take at the time of the testator's death, the courts have inclined to construe the legacy as vested, but payable in future. *Patterson v. Hawthorn*, 12 Serg. & Rawle, 113. And where legacies have been directed to be paid, after the termination of a life estate, to the legatee, or his heirs, the word "or," has been laid hold of to favour the construction, that the legacy had vested on the death of the testator; and, that the intention was, that it should be paid to the legatee, if living, or to the persons entitled as his legal representatives, after his death. But the authorities on this branch of the subject, have no application to cases where the legacy, or devise, never vested at all, for want of a person in esse, to take at the death of the testator. In cases of the latter description, the word "or" has never been held to save a lapse. A. devises to his executrix, or her heirs, and she dies in his lifetime. *Stone v. Evans*, 2 Atk. 16. So, where there was a bequest to A. for life, and after her decease, legacies were given to B., or to her proper representatives, in case she should not survive A.; then follows a bequest in these words: I also give to each of the children of my sister Elizabeth, or their representatives, or representative, two thousand pounds. One child died during the life of the testator, another died after the tes-

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tator, during the life of A. It was held, that the former lapsed, the latter vested. *Corbin v. French*, 2 Vesey, 418. The child who died in the lifetime of the testator, left a widow and children. If the disjunctive "or," could not be so construed by a Court of Chancery, in favour of a widow and children, as to save a lapse, why should it be so construed in a court *of [*32] law in favour of collateral relations? The court will not be inclined to overturn authorities, for the purpose of disinheriting the brother, and heir at law, of the testator. On the contrary, the settled rule is, says Judge Yeates, "that the heir at law, is the favourite at law and in equity, and is not to be disinherited without express words, or necessary implication." *Clayton v. Clayton*, 3 Binn. 488.

In regard to the question of intention. It appears that the death of the devisee was unknown to the testator, and there is nothing to show, that such an event was in the most remote degree contemplated by him; he, therefore, could not intend to provide against it; if he had, he would not have used these words. As between his cousin Richard and his brother John, there may have been reasons which induced him to prefer Richard; but, it is not to be inferred from the will, that he intended to prefer the brothers and sisters of Richard to his own brother John. Had the brothers and sisters of Richard stood upon an equal footing with him, in the estimation of the testator, they should have been named equally with Richard. The omission is evidence, that the testator did not intend to prefer them to his own brother. They also cited, *Brett v. Rigden*, Plowden, 341; *Cro. Eliz.* 422; *Lessee of Smith v. Folwell*, 1 Binn. 559; *French v. M'Ilhenny*, 2 Binn. 20.

The opinion of the court was delivered by

GIBSON, C. J.—The intention of the testator, when sufficiently apparent, is undoubtedly the polar star; and, it is sometimes said, that precedents serve rather to obscure, than to elucidate it. It is to be regretted, that this expression has been used by judges whose learning and ability give it currency. In the development of intention, rules of construction, which owe their existence entirely to precedent, and without which, no two minds would often, if ever, arrive at the same conclusion, are indispensable to certainty of result; particularly when, as sometimes happens, the judges are called on to suppose an intention, where, in fact, none ever existed. Any settled rule, which leads to a determinate effect, (in comparison with which, the fulfilment of any particular intent, is of secondary value,) is preferable to a process which would destroy everything like stability of decision, and leave titles depending on intention, to

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the decision of chance, and the sport of opinion. A well-established rule requires, that an implication by which the laws of descent would be suspended, shall be avoided: in other words, that the plain and certain disposition of the law, shall not be set aside, except in favour of an equally plain and certain disposition of the testator. To apply this to the will before us. The testator devises to his nephews, in exclusion of his brother of the half blood, all his "estate, both real and personal, to be divided between them, or to their heirs." Substitute and for or, and there is no room for dispute. This is resisted, because, [*33] as is said, it is never done but to *effectuate the testator's actual intention. But to take for granted, that the substitution would frustrate the actual intention, is to occupy the whole ground in dispute. It is said, however, that as the word estate itself, carries the fee, the word "heirs," would be altogether unnecessary, except to signify that the estate was limited alternately to each nephew, or his heirs, with a view to provide for the very contingency that has happened; and, that the inference from this is strengthened by the position of the word in the sentence. We may suspect that such was the object, but we have not sufficient ground to proceed on it as a thing judicially ascertained. The word heirs may undoubtedly be used as a term of special description, by which a devisee may take even in the lifetime of his ancestor; but, it is appropriately a word of limitation only, and he who would take by it as a word of purchase, must show clearly and incontestably, that it was used in that sense. Had the testator here, meant to provide against accident from the death of either of the principal objects of his bounty, it is reasonable to suppose he would, instead of leaving his meaning to conjecture, have said so in terms. He has not done so; and, the inference to be drawn from the use of a copulative, instead of a disjunctive, is too feeble to disinherit the heir.

Judgment affirmed.

Cited by Counsel, 4 W. 83; 2 Barr, 430; 6 Barr, 102; 10 Barr, 213, 361; 3 C. 57; 4 Wright, 114; 12 Wright, 503; 2 S. 330; 17 S. 451; 9 W. N. C. 522.

[SUNBURY, JULY 3, 1829.]

Fisher *against* Taylor and Others.

IN ERROR.

Testator directed his executors to purchase a tract of land, to be conveyed to them, in trust for his son, who was to have the rents, issues, and profits thereof, but the same was not to be liable to any debts contracted, or which might be contracted by his said son, at whose death, the land was to vest in the heirs of his body; and, if he should die without heirs of his body, then to vest in the right heirs of the testator. Held, that the son had not such an interest in the land as could be taken in execution, and sold for his debts.

EJECTMENT in the Court of Common Pleas of *Mifflin* county, removed to this court by writ of error.

Matthew Taylor, by his last will and testament, dated the 16th of July, 1821, directed as follows:—

“I will and direct, that my son, John Taylor, pay out of the land devised to him six hundred and fifty dollars; and that my son, Henry Taylor, pay out of the land devised to him, thirteen hundred and fifty dollars, to, and for the following use and purpose:—My executors hereinafter mentioned shall, within one year after my decease, purchase a tract of land, at the price of two thousand dollars, four hundred dollars to be paid in hand, and the residue to be paid in *four equal annual pay- [*34] ments; and, the tract of land so purchased, shall be conveyed to my executors in trust for my son, Sample Taylor, the said Sample to have the rents, issues, and profits thereof, but the same not to be liable to any debts contracted, or which may be contracted by the said Sample, and at the death of the said Sample, the tract of land aforesaid, to vest in the heirs of the body of the said Sample, in fee; and if the said Sample shall die without heirs of his body, then the tract of land aforesaid, to vest in my right heirs.”

The testator appointed his sons, John Taylor, and Henry Taylor, and his nephew, Samuel W. Taylor, his executors; and, letters testamentary were issued to them on the 20th of November, 1823. The executors, in pursuance of the said will, purchased, in the year 1824, of John Graham and wife, a tract of land, situate in Wayne township, Mifflin county, containing one hundred and eighteen acres, with a house, barn, and orchard thereon; for which a deed was made to the said executors, their heirs, and assigns, in trust, for Sample Taylor, to have the rents, issues, and profits, during life, but not subject to his debts;

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remainder to the heirs of his body, in fee; reversion to the heirs of Matthew Taylor.

The plaintiff in error, who was plaintiff below, had a judgment in the Court of Common Pleas of Mifflin county of August Term, 1825, on which a *feri facias* was issued, and levied, by his directions, on the life estate of the defendant, Sample Taylor, in this tract of land. By virtue of a *venditioni exponas*, to November Term, 1825, the estate thus levied upon, was sold by the sheriff of Mifflin county to the plaintiff, and a deed for the same was duly executed and acknowledged. The plaintiff thereupon brought an ejectment against the defendant, to recover the estate sold and conveyed to him. In this action, Henry Taylor, John Taylor, and Samuel W. Taylor, executors of Matthew Taylor, deceased, came into court, and prayed to be admitted, and were admitted, as co-defendants.

On the trial of the cause, the court charged the jury as follows:—

Burnside, President.—“The plaintiff’s counsel contend, that Sample Taylor had a life estate in the premises, which could be sold and conveyed by the sheriff, and he let into possession to take the rents and profits of the estate during the life of Sample Taylor, and insists, 1. That a judgment is a lien on every possible interest which a debtor has in land. 2. That a lease is subject to a judgment. 3. That a trust estate is liable for debts, and that this devise is within the statute of uses, and is subject to all the incidents of any other estate for life. 4. That the limitation is inconsistent with the estate granted, and that it is subject to the debts of Sample Taylor. These among others embrace the arguments of the plaintiff, and, however generally correct his propositions are, this court deny their application to the case before us. Matthew Taylor had a right to devise his estate to whom, and in what manner he [*35] pleased. *He had a right to make a provision for his son, and such a provision as would not be subject to the claim of creditors; and, in the opinion of the court, by his will he has done so. The executors take the estate upon the special trust, to let Sample have the rents, issues, and profits for his life. They have a right to the occupation of the estate, to rent it, to have it farmed and worked, and to pay over the rents, issues, and profits to Sample—they may permit him to use it. This is not a use executed by the statute. Trust estates have been recognized by our own legislature; they are excepted out of the statute respecting joint tenancy. Trusts are often created for the best purposes: for the support of infants, the protection of females, and the maintenance of the unfortunate. This court deny the right of the plaintiff to recover; and,

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they instruct you, that the sheriff's sale did not divest the executors of Matthew Taylor of their legal right to use and occupy this estate, and to pay over the rents, issues, and profits to Sample Taylor, and that the defendants are entitled by law to your verdict."

The jury accordingly found for the defendants, and the court thereupon entered judgment. To reverse that judgment, the plaintiff sued out the present writ of error.

The errors assigned were:—

"1. The court erred in charging the jury, that the estate of Sample Taylor was not executed by the statute of uses.

"2. The court erred in saying, that it was not subject to the claim of creditors.

"3. The court erred in charging, that the executors of Matthew Taylor had a right to the occupation of the estate, to rent it, to have it farmed and worked, and pay over the rents and profits to Sample Taylor.

"4. The court erred in saying, that the executors of Matthew Taylor had the legal right to use and occupy the estate, and that the sheriff's sale did not divest them of it.

"5. The court erred in denying the right of the plaintiff to recover."

The cause was argued in this court by *W. M. Hall* and *Blythe*, for the plaintiff in error, who insisted that Sample Taylor had such an interest in the land in dispute, as might be taken in execution, and sold for his debts: That he was to take the profits of the estate, was in the actual enjoyment of it, and could have turned the trustees out if they had refused to permit him to take the rents and profits: That the estate was clearly within the statute of uses, by which the use was executed and turned into possession; and, that it was in the power of no one to change the incidents of an estate. To support their argument, they cited, *Lessee of Humphreys v. Humphreys*, 1 Yeates, 427; *Hurst v. Lithgow*, 2 Yeates, 24; *Burd v. Lessee of Dansdale*, 2 Binn. 80, 91; *Carkhuff v. Anderson*, 3 Binn. 4; *Richter v. Selin*, 8 Serg. & Rawle, 440; *Ely v. Beaumont*, 5 Serg. & Rawle, 124; *Stahle v. Spohn*, 8 Serg. & Rawle, 317; *Rob. *Dig.* 404; 2 Bl. Com. 330, 333, 336; 2 Salk. 679; [*36] *Fearn*. 115; *Co. Litt.* 290, b.; *Jac. Law Diet.* 370; 1 Cruise, 461; 1 Sm. L. 7; *Pennock v. Hart*, 8 Serg. & Rawle, 379; *West v. West*, 10 Serg. & Rawle, 448; 1 Inst. 223; 1 Cruise, 660; 2 Bl. Com. 157; *M'Williams v. Nisley*, 2 Serg. & Rawle, 513; *Shaupe v. Shaupe*, 12 Serg. & Rawle, 12.

Banks and *Potter*, for the defendants in error, argued, that

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the deed to the executors of Matthew Taylor, vested in them as trustees, according to the directions of the will, the legal title to the property conveyed; the rents, issues, and profits to be applied to the support of the testator's son: That a man had a right to dispose of his property as he pleased, and it was the duty of the court to carry his dispositions into effect, according to his true intention, where that could be discovered, and was not inconsistent with the rules of law: That it was the plain and express intention of the testator in this instance, to make a provision for his son, which should not be taken away from him by any debts he might contract, and that there was no rule of law, which forbade such a disposition of a parent's estate. They cited, *Ruston's Executors v. Ruston*, 2 Dall. 244; *Lessee of Findley v. Riddle*, 3 Binn. 149; *Adams on Eject.* 81, 82; *Pow. on Dev.* 285; 1 Madd. Ch. 514, 559, 562; 1 Fonb. 16, 404; 1 Vern. 415; 1 Eq. Ab. 383; 2 Fonb. 18, in note; 1 P. Wms. 280; 1 Ves. 130, 238; 3 Munf. 399; 1 Cruise, 461, Sec. 12, 13, 19, 20, 23.

The opinion of the court was delivered by

SMITH, J.—The only question before the court below was, and it is the only question here, whether Sample Taylor had such an interest in the land mentioned in this ejectment, under the above-mentioned will and deed, as is by law subject to the lien of a judgment, and such as may be sold by execution against him for the payment of his debts? There never has been a question, or doubt, as to the intention of the testator. He manifestly designed to secure to his son, Sample Taylor, the enjoyment of the rents, issues, and profits of the land, during his life, in such a manner, that they should not be subject to be sold for the payment of his debts; and, he constituted his executors special trustees, to carry that intention into effect. The Court of Common Pleas correctly decided, that this was not a case within the statute of uses. It was necessary that the executors should take the legal estate for the purposes of the trust, in order to give effect to the testator's intention; and, they were, therefore, properly held to be entitled to use and occupy the land, to let it, or to have it tilled and worked, so as to enable them to comply with the disposition of the testator, in regard to the application of the rents, issues, and profits to Sample Taylor. A different construction would make the beneficial interest, which the testator intended to provide for his son, subject to be sold for his debts, when he expressly declared, that it should not be so subject, *and would thus set up a new will in place of that

[*37] which it affected to interpret.

The intention of the testator ascertained, the only question is,

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whether his disposition is contrary to law. A man may, undoubtedly, so dispose of his land, as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose, is by creating a trust estate, explicitly designating the uses, and defining the powers of the trustees. All this, we think, has been sufficiently effected in the case under consideration. Nor is such a provision contrary to the policy of the law, or to any act of assembly. Creditors cannot complain, because they are bound to know the foundation upon which they extend their credit. The act of assembly, cited from 1 Smith's Laws, 7, does not apply, the land in question not being the land of Sample Taylor, the defendant. He has no life estate in it, nor any interest which is subject to be sold for the payment of his debts. The benefit he derives under the will of his father, is merely the right of receiving from the trustees, the rents and profits of the premises, which they hold under the deed from John Graham and wife; to the perception of those rents and profits, they are in the first place entitled, for the purpose of fulfilling their trust.

We are of opinion, that the judgment of the Court of Common Pleas, was correct, and ought to be affirmed.

TOD, J., dissented.

Judgment affirmed.

Cited by Counsel, 1 M. 249; 2 Barr, 337; 7 Barr, 169; 3 H. 460; 1 Wr. 35; 10 Wr. 412; 14 Wr. 79; 7 S. 241, 242, 510; 14 S. 211; 20 S. 505, 506; 23 S. 190; 25 S. 122; 7 N. 278; s. c. 7 W. N. C. 381.

Cited by the Court, 1 H. 491; 10 Wr. 399; 11 Wr. 114; 9 S. 395; 4 O. 154; s. c. 13 W. N. C. 23; 2 W. N. C. 438.

Approved and followed in, 7 W. & S. 25.

The doctrine of this case has never been shaken, and wherever the intention of the testator has been *expressed* that the beneficiary shall not part with it, and that creditors shall not touch it, the intention has been carried out by the court; but it is necessary that provisions against alienation and liability for debts should be expressed: 10 Wr. 492: or else that *entire discretion* be vested in the trustees as to what shall be done with the income: 17 S. 473. Two recent cases illustrate the length to which this doctrine has been carried; 4 O. 153; s. c. 13 W. N. C. 23, where the income of a spendthrift son trust was protected from an attachment under a judgment for arrears of alimony; and 7 N. 276, s. c. 7 W. N. C. 381, where one of the beneficiaries under such a trust was the trustee and wasted the estate, and it was held (on a second argument) that his share of the remaining estate was not liable for the *devastavit*.

One *sui juris* cannot, as against creditors, create a spendthrift trust for himself: 6 Wr. 330.

[SUNBURY, JULY 3, 1829.]

Case of Boal's Appeal.

APPEAL.

An appeal to the Supreme Court, under the act of assembly of the 16th of April, 1827, relative to the distribution of money arising from sheriffs' and coroners' sales, should be in the name of the party or parties aggrieved; and the recognisance should be taken, in such sum as the Court of Common Pleas may deem necessary, to the commonwealth or some individual for the use of the parties interested.

A written acknowledgment, of record, by the defendant, that a judgment is in full force, is as effectual to keep it alive, as a *scire facias*.

For the purpose of keeping a judgment alive by execution, it is immaterial whether the execution be issued before or after a year and a day from the entry of the judgment.

A writ of restitution on the reversal of an erroneous judgment, creates a lien on goods from the time it goes into the sheriff's hands, and on lands, from the time of the levy.

APPEAL from the order of distribution of the proceeds of the sale of the real estate of James Boal, by the Court of Common Pleas of *Lycoming* county.

[*38] *A sale of the real estate of James Boal having been made under a judgment, obtained against him in the Court of Common Pleas of *Lycoming* county, the money was brought into court, and the distribution of it among the creditors having liens upon the land sold, having, after much contest, been decided by the court, an appeal to the Supreme Court was entered under the act of assembly of the 16th of April, 1827.

To report all the different claims made in the court below, and the decision upon each, would be unnecessary. It is sufficient to state the points considered in the Supreme Court, which were:—

1. In what manner the recognisance on the appeal should be taken.

2. Whether the award of restitution on the reversal of a judgment of an inferior court, be in itself a binding judgment, and if it be, from what time?

3. Whether a written acknowledgment, by the defendant in a judgment, that it is in full force, entered on the docket of the court, be sufficient to keep the judgment alive, without a *scire facias*?

4. Whether the lien of a judgment is continued without a *scire*

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facias, by issuing an execution after the expiration of a year and a day.

After argument by *Anthony, Armstrong, Lewis* and *Bellas*, in support of the interest of their respective clients, the opinion of the court was delivered by

ROGERS, J.—The estate of James Boal having been sold by the sheriff, and an order made for the distribution of the proceeds among the creditors, by the Court of Common Pleas of Lycoming county, an appeal has been taken, under the third section of the act of the 16th April, 1827, which gives liberty to any person who may consider himself aggrieved, &c., to appeal to the Supreme Court, within twenty days, subject to the same rules and regulations, as appeals made from the decision of the Orphans' Court. The appeal is made from the order of distribution, so that we cannot perceive any necessity for more than one appeal, which vests the jurisdiction in the Supreme Court, to inquire into the whole matter, and distribute the money according to law. And this can be attended with no danger, and but little inconvenience, as all the persons interested are either present in the Court of Common Pleas, or have an opportunity of being so, as it is the duty of the court to cause notice to be given, either personally, or by such advertisement as they may deem proper, prior to making their decision. Besides, the Supreme Court will take such order, on a proper application, as to prevent the rights of persons being affected, who have no opportunity of being heard. The opinion of the court has been required, as to the form of the appeal. We are of opinion, that it should be in the name of the party or parties aggrieved, and that the recognisance should be taken in such sum as the Court of Common Pleas may deem necessary, and to the commonwealth, or *some individual, for the use of the parties interested. The recognisance was taken in the name [*39] of James Boal, the defendant, and we will intend, that is is for the benefit of those who may be aggrieved by the appeal.

The order of distribution involves several questions, which, when settled, removes all difficulty in the distribution of money raised by the sheriff's sale.

We agree with the Court of Common Pleas, that the entries of the docket, by James Boal, continued the lien of Williams's judgment, and this is on the authority of a case decided in Philadelphia, and not yet reported.

Although the *fieri facias* in Brown's judgment did not issue until after a year and a day, it is not distinguishable in principle from *Taylor v. Young*, 2 Binn. 228. In that case, it was decided, that an execution within a year and a day, continues the

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lien of a judgment, without resorting to a *scire facias*, under the act of assembly of the 4th of April, 1798. And the reason given by Justice Yeates is, that the *scire facias* operates as notice to the parties interested, and evidences the intention of the creditor to claim the lien of his judgment: That the taking out a *fieri facias*, levying on the goods and lands of the defendant, and condemning the lands by an inquest, are matters of notoriety; and, in point of notice of the creditor's pretensions, tantamount to a *scire facias*. The distinction between an execution issued before, and after the year and a day, is too nice for ordinary comprehension; and in practice, it has been considered as making no difference. To decide otherwise, would endanger many honest claims. This point has lost most of its importance by the act of assembly of the 26th of March, 1827, passed to remedy what some consider a misconstruction of the act of assembly of 1794. That act is prospective, and confirms, rather than invalidates the uniform practice which has obtained, since the case of *Taylor v. Young*.

The next question is, whether a writ of restitution be a lien, and from what time. A judgment of reversal, is a judgment of the Supreme Court; and the practice is, to remit the record to the Court of Common Pleas, in order to have the judgment carried into effect. *Russel v. Gray*, 6 Serg. & Rawle, 208; *Duncan v. Kirkpatrick et al.*, 13 Serg. & Rawle, 292. The difficulty is, not whether it be a judgment, but whether it be a lien, and from what time it commences. After a most diligent search, I find but little in the books calculated to throw light on the question, nor have the researches of counsel been more successful. We do not consider the lien as commencing from the time of reversal, from the danger and almost certainty of affecting the rights of *bona fide* purchasers, without notice. This would be an unreasonable effect of the judgment of reversal. It is not pretended, it would bind lands through the whole district, or in the county where the Supreme Court held its session, but in the [40] county from whence the judgment came, and to *which, for execution, it must be remitted, and this would expose it to the objection which I have mentioned. It is the opinion of the majority of the court, that as the writ of restitution is strictly an execution, it comes within the same rules as other executions; and, that the lien commences on the goods from the time the writ goes into the hands of the sheriff; and, on the lands, from the time of the levy, &c. My opinion is, and in this, I believe, I speak the sentiments of Judge Tod, that the lien commences from the time of the remittance of the record, and docketing it in the county from which it was removed. To avoid misapprehension, we would wish to be understood, as not

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extending this decision beyond the special facts of this part of the case.

Cited by Counsel, 1 Barr, 130; 8 Barr, 299; 1 J. 20; 2 J. 114; 12 C. 19; 3 Wr. 57; 15 N. 295.

Cited by the Court, 4 R. 110; 1 M. 365; 7 Barr, 257; 12 H. 268; 9 N. 374.

[SUNBURY, JULY 3, 1829.]

Brown *against* The Commonwealth.

IN ERROR.

A county treasurer's account, settled under the provisions of the act of assembly of the 30th of March, 1791, may be altered by the auditors, at any time before it is returned to the Court of Common Pleas.

A treasurer of a county is not entitled to compensation for travelling out of the county to collect taxes on unseated lands.

If the auditors proceed to settle the account without giving notice to the treasurer, and their report be filed, no appeal entered, and an execution issued, the court, on application, will set the report aside; but, if the treasurer enter an appeal and the whole matter is taken up anew in the court, the defect is cured.

ERROR to the Court of Common Pleas of *Lycoming* county.

Matthew Brown, the plaintiff in error, had been the treasurer of *Lycoming* county, and on the termination of his office, his accounts were submitted for settlement to auditors, under the act of assembly of the 30th of March, 1791. From their decision he appealed to the Court of Common Pleas; and, on the trial, on the 8th of September, 1827, the jury found a verdict in favour of the commonwealth, for the sum of three hundred and eighty-two dollars and forty-two and a half cents.

Several bills of exceptions, as well to the admission of evidence, as to the charge of the Court of Common Pleas, were taken and argued in this court, by *Anthony*, for the plaintiff in error, and by *Armstrong*, for the defendant in error.

The opinion of the court, which embraces all that is material in the case, was delivered by

HUSTON, J.—By the act of assembly of the 30th of March, 1791, auditors were to be appointed amicably to settle the accounts of *treasurers, commissioners, &c., of the county; [*41] and although the auditors are now, by a subsequent law, to be elected, the other provisions of the act of assembly of

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1791, are in force ; at least, such of them as are material in this case.

Section fifth provides : " That the said auditors having examined and settled the said accounts, to the best of their skill and ability, shall report the same with the respective balances due, to, or from such commissioners or treasurer, to the next County Court of Common Pleas for such county, who shall thereupon cause such report and settlement to be filed among the records of said court : and such report, from the time of being so filed, shall have the effect of a judgment, on the lands, tenements, and hereditaments of such commissioners or treasurer, who shall thereby appear to be indebted : and, if within sixty days after such report, made and filed, the said commissioners or treasurer, their executors, or administrators, or any of them, shall enter their appeal in the said court, from the said settlement, or any part thereof, it shall be lawful for the court to direct an issue, wherein the commonwealth shall be made plaintiff or defendant, as the case may require, to be tried by a jury during the next term, upon whose verdict final judgment shall be entered." It then goes on to prescribe the bail to be entered by the party appealing.

Matthew Brown was treasurer of Lycoming county, in the year 1826 ; and an account, finding him indebted to the county, was settled by the auditors on the 31st of January, 1827, and this report given to the Court of Common Pleas, who ordered the same to be filed. By this report, Mr. Brown was found indebted to the county two hundred and thirty-three dollars. He appealed in due form ; and, on the trial of the issue, several points arose, which are the subjects of this writ of error. After the jury were sworn, the plaintiff's counsel offered to read and show to the jury the account of Matthew Brown, treasurer, &c., as filed in the office of the prothonotary, according to law. This was objected to, and the court admitted the report of the auditors, order of court to file, &c., and the appeal, to show what were the report and proceedings till this time, but not to establish any one item charged in the said report against the treasurer. This formed the subject of the first bill of exceptions, but was not insisted on here, and ought never to have been taken. In those proceedings specially prescribed by act of assembly, and not commenced in the ordinary course of law, it is right that the nature of the dispute, the manner in which it came before the jury, and what is before the jury, should be understood by them ; and, with the limitation prescribed by the court, nothing would so clearly and satisfactorily show this as the course taken. The plaintiff then offered to adduce evidence to prove the items of which the debit side of

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the account was composed. This was objected to on the following ground, and this was the only matter on which this court were seriously called on to decide:—The auditors *had [*42] met on the 5th of January, 1827, and gone through the account of Mr. Brown, and made out a report, signed by two of the three auditors, finding a balance in favour of Brown of two hundred and seventy-seven dollars. This was never presented to the court, but was seen by the commissioners, who drew an order, or orders, in favour of Brown for that amount. It was also copied into what is called the auditor's book, on the same day; and, in that book, immediately under the account, the other auditor wrote:—

“I do hereby protest against the passage of the above account; because it is incorrect in part, contrary to law in part, and because the compensation allowed Mr. Brown, is unnecessarily extravagant.

“W. R. POWERS.”

Afterwards, one of the auditors who had signed the account, changed his opinion. The account, as copied into the auditor's book, had a cross put on it, and this auditor took his name from the account made out and signed for the purpose of being given to the court to be filed. The auditors met again, and on the 31st of January, 1827, two of them signed the report which was given to the court, and filed, and which was appealed from, and was now trying.

The defendant's counsel showed the court this cancelled account of the 5th of January, 1827, and the same account in the auditor's book, crossed; and insisted it was conclusive; that the auditors, or a majority of them, having once agreed on a report, copied it into the book, and signed it, without having handed it to the court, were bound—they could not revise or alter it. The court held this not to be the law, and admitted the plaintiff to prove the items of the debit side of the account, and to this the second bill of exceptions was taken.

We are of opinion there was no error. I can see no ground in reason, why any referees, or arbitrators, who have made an award or report, may not, before it is finally delivered to the parties, or the court, reconsider it, and if found wrong, change it. There is nothing in the act, or acts of assembly, which will forbid this, in the case of county auditors. They are to examine and settle the account “to the best of their skill and ability;” and their report is not to be instantly filed, but to be reported to the next court. Reason, and justice to themselves and to the county, and the parties unite in permitting them to use their

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skill and abilities, until the report passes from their hands to the court. It was not necessary that this account should go to the commissioners; and, if it did reach their office, they were bound to know, that until given to the court, and ordered to be filed and recorded, it was not conclusive. The account settled by the auditors has been, in some degree, confounded in the argument, and is too often confounded with an account directed by the fourteenth section of the act of assembly of the 11th of April, 1799. This latter act directs the treasurer, if required, [*43] *to furnish a statement of his account, balanced, once in three months; and that he shall, once in every year, settle his accounts with the commissioners, and produce his vouchers, which being allowed by the commissioners, shall by them be laid before the auditors, appointed under the act of assembly of 1791, to settle the accounts of commissioners and treasurer, who shall proceed to the settlement thereof, as by the said act is directed. The two acts taken together, contemplate two distinct settlements of the treasurer's accounts; one with the commissioners, who draw all, or nearly all the orders which the treasurer is to pay, and they are to examine, among other things, these orders, and see that they are genuine. This account is to be submitted to the auditors, who are to ascertain that the orders and payments on them were legal as to their objects, such as are directed by law, or otherwise within the powers and duties of commissioners and treasurers, and also, that they are reasonable in their amount, &c.

The first account settled by the commissioners with the treasurer, is not conclusive on the auditors; and the report of the auditors, even when made to the court, and by them ordered to be filed among the records, is not conclusive. An appeal within sixty days is given, and if taken in the manner prescribed, the whole is investigated anew before a court and jury, in the county, and this again may go to the Supreme Court.

The two accounts agreed to a cent in the amount of money received by the treasurer from collectors in the county, and from the owners of unseated lands for county and road tax; and, also, in the amount of the orders paid by the treasurer; but, two orders, drawn by the commissioner in favour of the treasurer, and for which he asked credit for the amount retained, were struck out of the account in the second report made and filed; and, also, rejected by the court and jury. One of them was an order drawn by the commissioners in favour of the treasurer, for his time and expenses in going to Philadelphia, to collect the taxes due by the owners of unseated lands. It is a practice of many years' standing, for the treasurers of the counties containing much unseated land, to go to Philadelphia

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in the winter, and give notice generally, that they are in the city, by a note in the newspapers, and their books being with them, the owners of the unseated lands, or many of them, call, examine their accounts and pay them. The treasurer often receives large sums in this way. The 14th section of the act of assembly of the 11th of April, 1799, above cited, directs, that the commissioners shall allow the treasurer so much per cent. on all moneys received and paid by him, as they shall, from time to time, deem sufficient for his services, which being approved by the auditors aforesaid, shall be in full for his services as treasurer. Where a positive law prescribes the manner and nature of the payment to be made to an officer, the directions of the law are, and ought to be the only rule. We had at one time, in this state, a custom of admitting, under the *name of compensatory fees, many charges [*44] by officers, not allowed by any law. These, in many instances, are now expressly forbidden by the late acts of assembly, and ought always to have been rejected under the fair construction of our laws. An officer derives equally his authority and his compensation from the law, and where both are defined in the law, he can no more enlarge the one than the other. It is no part of the duty of a treasurer to travel the country to collect money. If he can receive pay for his time and expenses in going to Philadelphia, why not for going to Lancaster, and Carlisle, and Pittsburg, and New York? in short, for going to any and every place in which an owner of unseated land resides; and, thus, change his office from that of treasurer to collector, and his salary from percentage on money received and paid, to daily pay in travelling to collect it? The other item was an error in computing the sum due from the county on deeds and costs on sales of lands, purchased by the commonwealth for the county, and was not objected to here.

Another difference in the two accounts arose from this:—The first account, by mistake, we must suppose, gave the treasurer a per cent. on the amount of road tax assessed, instead of on the amount of road tax received and paid over by the treasurer. It was not alleged here, that there was any error in correcting this.

Much was said about the power of a court and jury, and something about the power of auditors to change the rate per cent. agreed on by the commissioners, as compensation to the treasurer. The act above cited, expressly declares, that the compensation agreed on by the commissioners, be approved by the auditors. The terms “being approved by the auditors,” imply an exercise of judgment; and, the right of appeal

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from the report of the auditors, is general to the whole account, or any part of it. I do not see how this court can make this an exception. At the same time, I know it is usual for an understanding to exist in most counties, that every treasurer shall receive a certain rate per cent. on moneys received and paid; and, I would not, without strong reasons, depart from what may fairly be considered a contract, if not express, at least, clearly implied. But where, as in Lycoming county, this rate varies with every treasurer, according to some principle not generally known, or acknowledged, or according to no principle, the right to advise and control it, is a wholesome provision.

A great deal was said on a subject which was not expressly alleged as error, but which is too important to be passed over. It was proved at the trial, that Mr. Brown did not attend before the auditors while they were making out the report of the 31st of January; and the assertion was often repeated, that he had no notice that the auditors were about to meet and revise the account. If they did proceed without giving him notice, it was grossly wrong. The act which gave them authority, required them to give notice, and empowered them, after notice, to proceed *ex parte*,* if the treasurer did not attend.

[*45] *If no notice was given to him, and the report had been made and filed, and no appeal, and an execution had issued, the court, on application, would have set it aside. The principle is universal in this country, that no man's person or property can be affected by a judgment, of which he had not actual or legal notice; but, where he appeared, and appealed, and the whole matter was in court taken up anew, he, at the trial, was in the same situation as if he had appeared before the auditors; and, in judging of the proceedings in court, where he did appear, we are confined to those proceedings.

But I am by no means satisfied he had not notice. The auditors were not examined in court. This point was not directly made there, perhaps not mentioned; and, from many parts of the case, I would infer, that he had notice, and refused to attend.

Judgment affirmed.

Cited by Counsel, 2 Barr, 17; 28 S. 160; 31 S. 342; s. c. 3 W. N. C. 85.

[SUNBURY, JULY 3, 1829.]

Robeson and Others *against* Gibbons.

IN ERROR.

A subsequent survey cannot affect a prior one, regularly made and returned; and if the court be requested by counsel to charge the jury to this effect, and refuse to do so, it is error.

The omission to charge the jury that a delay in bringing suit for any time short of that prescribed by the statute of limitations, is not a bar to the suit, when requested by counsel to do so, is error.

A connected draft from the surveyor-general's office is evidence, not to make title, but to show whether there are any, and what interferences.

ERROR to the Court of Common Pleas of *Union* county.

Ejectment for three hundred acres of land or thereabouts, bounded by lands late of Charles Hall, and others.

The plaintiffs in error who were also plaintiffs below, were the heirs of William Bonham, deceased, and on the trial, after having given in evidence a warrant dated September 28th, 1773, in favour of David Emerick, for one hundred acres, and another, dated May 4th, 1774, in favour of David Emmarts, for one hundred and fifty acres, they offered a certified paper dated May 13th, 1828, purporting to be a connected draft of two surveys in the names of David Emerick, and David Emmarts, and also a return of survey certified in the same manner, being an extract from the surveyor-general's book of March 8th, 1774, to which the defendant's counsel objected. The evidence was overruled, and the plaintiffs took a bill of exceptions.

*The title under Emerick's warrant was conveyed to Bondham, who, on the 4th of February, 1824, obtained [*46] a patent.

The defendant's title was founded upon an application of William Gibbons, dated 31st of March, 1809, referring to an improvement of March, 1802; a warrant dated May 27th, 1809, but which was not produced, and a return of survey of August 2d, 1809.

The plaintiffs' counsel submitted to the court certain propositions on which they requested the jury might be instructed.

These propositions, and the answers given to them by the court, were as follows:—

1st. That the official draft of survey and return, and the patent to William Bonham, on the warrant in the name of David Emerick, are strong evidence in the plaintiffs' favour, that their survey was actually made upon the ground as repre-

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sented by that draft; and unless the jury find strong evidence that the survey was made differently, they are conclusive proofs that it was made as that draft shows it.

Ans. To this the court assent, but those are facts for the jury.

2d. That if the jury believe the testimony of John Lloyd and Joseph Stillwell, respecting the lines of Emerick, they were made according to his official draft, and they include the buildings and improvements, of which Gibbons is in possession, and the plaintiffs' official title is the best, if the survey was so made.

Ans. The plaintiffs' title is the best, if his survey includes any of the defendant's land. As to the testimony of John Lloyd and Joseph Stillwell, it is for the jury to determine. Whether their testimony proves that Emerick's survey does include the buildings and improvements which Gibbons is in possession of, is for the jury to determine from all the evidence.

3d. Whether the official survey of the defendant, the lines dotted upon it for Emerick, or anything else upon it is evidence, or strong evidence, that the plaintiffs' survey was not made as represented by their official draft, in the name of Emerick, as sworn to by Stillwell and Lloyd? And whether there is any evidence whatever, against the existence of the plaintiff's survey as returned?

Ans. The defendant's survey returned, is *prima facie* evidence, that the survey was made agreeably to the return. The plaintiffs' survey and return are also *prima facie* evidence, that their survey was made agreeably to the return of survey, and if the jury find there is any interference, the plaintiffs would be entitled to the land within their own lines, unless the defendant can hold by the statute of limitations; and whether the surveys were agreeable to the official draft is a fact for the jury.

4th. That unless the defendant has had an exclusive adverse possession for twenty-one years before this ejectment was instituted, the limitation act does not protect him. That the possession must *also have been inclosed during that time, [*47] and without interference, and that if both Bonham and Gibbons were in possession of the interfering parts of the survey, the elder and superior title of plaintiffs is to hold all the lands, excepting what Gibbons had so actually inclosed for twenty-one years, if any there is.

Ans. To this the court assent: an actual occupancy with definable boundary, without fencing, would be sufficient to hold by the statute of limitations so far as he had actually occupied for

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twenty-one years, before the commencement of the plaintiffs' action; but constructive possession will not do where there are two adjoining tracts, as in this case, each holding a legal estate under the commonwealth, and there is an interference of lines; the land belongs to him who has the oldest and best title. In this case if the jury believe that there is an interference, the land belongs to the plaintiffs who have the best title, so far as the defendant has not been in the actual occupancy with definite boundaries for twenty-one years before the commencement of this action. It is immaterial whether these boundaries are a fence, or a ditch, or a hedge, or the land is surrounded with brush, so that there are actual definite boundaries.

5th. Whether the plaintiffs are barred in equity, from recovering, by any improvements of the defendant's and Bonham's delay to bring his ejectment?

Ans. He is not—But Bonham suffering Gibbons to patent and pay for his land, and make valuable improvements, without entering his caveat, or claiming the land, is strong evidence that William Bonham in his lifetime did not claim the land in possession of Gibbons.

The errors specially assigned in this court were:—

1st. The rejection of the evidence stated in the first bill of exceptions.

2d. In the answers given by the court to the points made by the plaintiffs' counsel on the trial.

The cause was argued in this court by *Bellas* for the plaintiffs in error, and *Greenough* for the defendant in error.

The opinion of the court was delivered by

HUSTON, J.—The plaintiffs here were plaintiffs below, and showed a warrant in 1773, and another in 1774; also a survey on Emerick's warrant, (the one in question,) returned into the surveyor-general's office in 1774, and a patent. They also proved that the lines of the survey in question were on the ground, agreeably to the return of survey, or at least three of them, and that the defendant was residing within those lines. The defendant showed a warrant in 1809, founded on an improvement in 1802, a survey in 1809, and a patent in 1812. Much testimony was given as to the defendant's improvement: whether his original improvement was within the plaintiffs' survey; whether it had been duly followed up; when and how he got into possession where his present *house is. All this was matter to be decided by the jury. Several points [*48] of law were proposed by the counsel, on which the court were requested to give opinions, and opinions were given. We do

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not see any error in these, on giving the opinions a fair construction, except the third. It has happened in this case, as in many others, that the propositions submitted to the court are not expressed in the most definite manner, and it is not certain that the court understood some of them in exactly the same manner that he who wrote them did.

It is usual and proper for a deputy surveyor to note on his draft of return of survey the names of the older surveys which the one then returned adjoins. The deputy in this case was an excellent and accurate officer. In the draft of the defendant's survey, he notes on the outside of one line, that it adjoins D. Emerick, (the plaintiffs' warrant,) and by dotted lines shows what he supposed to be the length of Emerick's line, which the defendant adjoined, and the course of the other lines of Emerick, running off from that line. The defendant having insisted on these marks on his own survey, designating, as he supposed, the plaintiffs' claim, the court were asked to charge the jury, as to whether this draft of the defendant's, and what was written on it, were evidence, or strong evidence, that the plaintiffs' survey was not made as represented by the return, under seal, and as the lines are proved to be on the ground. The answer does not meet the point; in fact, there is no answer.

It is not supposed that a deputy surveyor, in executing a survey, runs all the lines of former surveys which it adjoins: he ought to have all the drafts of former surveys in his hands, but this is not always the case; he knows those lines which he adjoins in the survey he is making, or somebody shows them to him, and he generally takes care not to interfere with prior surveys. The names and notes on the draft he returns are evidence of how he understood the matter at the time; but, a little reflection will satisfy any person that these are only of use to show the relative situation of the survey then making. In this case, the plaintiffs' survey was made and returned in 1774; their title depended then, and depends now, on what was done at that time; their right, and the extent of that right, were then established; and no act of any individual or officer in 1809, can in the slightest degree affect it.

Whether Mr. Domul ran, or did not run the lines of Emerick, in 1809; whether he had a correct or incorrect draft of Emerick's survey; or whether the lines of that survey were shown him erroneously by the defendant, or by some other person; nay, whether he executed the defendant's survey in part on ground within Emerick's by mistake, or by design, is wholly immaterial. No act of the defendant's, or of a deputy surveyor, can divest the right as before established; it cannot be taken

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away from the owner except by the operation of the statute of limitations, or by the owner's sale of it.

*These notes or memorandums on a draft are often used as illustration, as proof of location; or where a draft is lost, as secondary evidence; and, where two surveys are made, at the same time, by the same surveyor, and some mistake in the drafts as returned, may avail, as to title; but, that the memorandums on a survey made in 1809, should control, or in any way affect a survey in 1774, returned and patented, and the lines of which are still found on the ground, is out of the question. They did not weigh a feather—they ought not to have been regarded by the jury, and so the court should have told them.

The answer to the last point is rather loose. The true answer was, that William Bonham, not bringing suit sooner, was no bar to the plaintiffs' recovery. The time prescribed by the statute of limitation is a bar. I would adhere to that strictly, and neither relax nor enlarge for favourable or hard cases; it is a matter of positive enactment, and neither courts nor juries can disregard it, without forgetting or disregarding their duty.

There was another point made in this cause, as to the nature and effect of a connected draft from the surveyor-general's office under the seal of that office. The case, *Vickroy v. Shelley*, 14 Serg. & Rawle, 372, settles this point, and to that I refer.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by the Court, 7 Barr, 237; 23 S. 316; 1 W. N. C. 488.

[SUNBURY, JULY 3, 1829.]

Lloyd *against* Nourse and Wife.

IN ERROR.

It is a good cause of principal challenge to a juror, that he has formerly acted as an arbitrator in the same cause.

In an action of trespass for the mesne profits, the title of the plaintiff, who has recovered in ejectment, cannot be disputed.

ERROR to the Court of Common Pleas of *Northumberland* county.

Joseph Nourse, and Caroline, his wife, after recovery in ejectment, brought an action of trespass *vi et armis*, against William A. Lloyd, defendant in the ejectment, to recover the mesne profits.

On calling the jury, to try the issue, one of them was challenged by the plaintiffs, because he had been an arbitrator in a

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former ejectment, brought by the same plaintiffs, against one Joseph Cake, for the same land. The challenge was allowed, and the defendant's counsel took a bill of exceptions.

After the plaintiffs' evidence had been gone through, the defendant offered to prove, that he had a better title to the land [50] than the plaintiffs. *The evidence was objected to, and overruled by the court, who sealed another bill of exceptions.

A writ of error was sued out, and *J. Hepburn* and *Bellas*, assigned for error, 1. The sustaining the challenge to the juror; and, 2. Rejecting the evidence offered by the defendant of a superior title to that of the plaintiffs. They contended, that the objection to the juror might be a ground of challenge to the favour, but not of principal challenge. *Pipher v. Lodge*, 16 Serg. & Rawle, 219; *Luffborough v. Parker*, 16 Serg. & Rawle, 351. They referred to 3 Bac. Ab. 351, to show the general rules on which one or the other of the challenges is to be taken. In *Harper v. Kean*, 11 Serg. & Rawle, 280, it was held, to be no exception to a juror, that he had been examined as a witness before arbitrators in the same cause; and, in 8 Durell v. Mosher, 8 Johns. Rep. 347, it was held, to be no objection that the juror had previously declared an opinion.

Greenough and *S. Hepburn*, for the defendants in error, justified the allowance of the challenge, and contended, that the objection to the juror was stronger than to a grand juror, who is never allowed to sit as a traverse jurymen on the trial of the party against whom he had concurred in finding a bill. In *Irvine v. Kean*, 14 Serg. & Rawle, 292, it was held a good cause of challenge to a juror, that he had voluntarily declared, he had heard the evidence on a former trial of the same cause, and had made up his mind.

The opinion of the court was delivered by

SMITH, J.—The plaintiff in error was defendant below, in an action of trespass *vi et armis*, for the mesne profits of certain property, which the defendants in error had recovered from him in an action of ejectment. The action of trespass was tried on the 20th of November, 1828, when a verdict was rendered for the plaintiffs against the defendant, for four hundred and sixteen dollars and five cents damages, and judgment thereon was duly entered. At the trial, two bills of exceptions were taken by the defendant below, and on these, errors are here assigned:—

The first is, that the court erred in sustaining the challenge to Charles Gale, a juror.

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And the second, that the court erred in rejecting the evidence offered by the defendant, of a superior title to that of the plaintiffs.

The first error assigned, alone merits attention. It appears, that Charles Gale, who had been summoned a juror, was called, and challenged for cause, by the plaintiffs, because he had been an arbitrator in an action of ejectment, brought by William A. Lloyd, against John Cake, to November Term, 1826, in the Court of Common Pleas of Northumberland county, for the land, from which the mesne profits were claimed in this suit; and had signed an award in favour of William A. Lloyd. This challenge was objected to, as insufficient in law to prevent the juror from being sworn to try *the issue in this case. [*51] The court overruled the objection, and allowed the chal- [51] lenge of the plaintiffs. This is the first error. It did not escape the discernment of the legislature, when they formed our jury system, (which is peculiar in this State, and the State of New York,) that it was necessary, in order to secure a free, independent, and impartial administration of justice, that jurors should not only be exempt from all objections of interest, but even from any supposed bias; and, hence, in the various qualifications required, we so evidently see their anxiety to guard, as much as possible, against selecting, or returning as jurors, persons, who might be considered, not impartial or judicious men. In the case before us, the juror, who was challenged, had decided the title to the land, in favour of William A. Lloyd, and signed an award, now on the record, solemnly declaring his opinion. The law presumes, that a man, who has made up his mind, especially if he has declared it under his name, and placed it on record, will not be so perfectly impartial, as a juror ought to be. In the case of *Durell v. Mosher*, 8 Johns. 445, relied on by the plaintiff in error, it was objected to a juror, that he had said, in a conversation about the controversy, that the defendant was wrong, and the plaintiff was right; and it was held no objection, because he had given no decided opinion on the merits of the cause. It will be readily seen, that the case referred to, does not decide the one under consideration; because, here, the juror had not merely expressed an opinion, but had given a decided opinion, under the solemnities of an oath, on the merits of the cause; and, this too, after he had heard and examined all the testimony. It was not reasonable to suppose, that no bias remained on the mind of the juror, or that it was likely he would give any damage, or fair damages, for the occupation of the land. We think, therefore, that he did not stand, as he ought to have done, unbiassed, and that he was properly challenged. This case is, in my opinion, stronger than that of

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a grand juror, who has found an indictment, on hearing the testimony on one side only; but, he would not be suffered to sit as a traverse juror, on the trial of the defendant in that indictment. There was, in our opinion, no error in rejecting the juror.

As to the offer of the defendant to prove his title to the premises, which, he alleges, was superior to that of the plaintiffs, it is not necessary to say anything. The decision was right. The judgment is therefore to be affirmed.

Judgment affirmed.

Cited by the Court, 2 W. & S. 313.

[*52]

*[SUNBURY, JULY 3, 1829.]

Wood *against* Davidson and Another.

IN ERROR.

If an action be brought for a legacy without a refunding bond having been previously tendered, or filed, the defendant may plead the want of such bond in abatement, or, on the return of the writ, may move the court to abate it, or the court may stay proceedings till a reasonable indemnity be given.

ON the return of a writ of error to the Court of Common Pleas of *Lycoming* county, it appeared that William Wood brought an action of *indebitatus assumpsit* for money had and received against Arthur Davidson and Thomas Wood, administrators *pendente lite*, of Dr. Thomas Wood. The case, notwithstanding the form of the declaration, was treated as an action for a legacy, and no refunding bond having been tendered or filed before the action was brought, the court below, on the trial, ruled that "the suit could not be sustained without the plaintiff's tendering or filing a refunding bond, as the suit is brought for a distributive share of the estate of James Wood, deceased." Verdict for the defendant.

The writ of error was argued by *Campbell* for the plaintiff in error, and *Ellis* for the defendants in error.

The opinion of the court was delivered by

ROGERS, J.—It is enacted in the fourth section of the act of the 21st of March, 1772, that no suit shall be maintained for a legacy until reasonable demand made of the executor or ad-

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ministrator, and an offer made and filed of a refunding bond, with two sufficient sureties, with condition, that if any part, or the whole thereof, shall, at any time after, appear to be wanting to discharge any debt or debts, legacy or legacies, which the executors, &c., shall not have other assets to pay, then he, the said legatee, will return his legacy, or such part thereof, as shall be necessary for the payment of said debts or a proportionate part of the legacies; and, in default thereof, the section provides the process issued shall abate. The plaintiff claims by the will of Dr. Wood, so that the administrators have a right to require an indemnity, with condition, underwritten, as provided by that act; and the bond, as had been decided in *Ross, Garnishee of Ross, v. M'Kinney*, for the use of Ross, should be tendered and filed previous to the commencement of the suit; and in this there is a distinction between a suit for a legacy and a distributive share. In this construction of the act we all concur; but there is some difference of opinion as respects the manner the omission must be taken advantage of by the defendant. It appears to a majority of the court, that the defendant should move the court, at the return of the writ, that the suit abate, or that he should file *a plea in the abatement; and this [*53] opinion is warranted by the words, the spirit and the practice, although not uniform, since the passage of the act. The legislature have used a technical term with a technical signification, and, we are to presume, with a full knowledge of its meaning. It would be unjust that the defendant should lie by until the trial, and then, upon a mere formal objection, turn the plaintiff round to a new suit. We do not consider the estate of Dr. Wood without remedy; and, in case a refunding bond may be necessary for the security of the executor, the court have power to prevent injustice by staying the proceedings until a reasonable indemnity be given. And this equitable power is recognised in the case of *Ross v. M'Kinney*, decided at Chambersburg, and not yet reported.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 6 Wh. 65; 1 W. 312; 9 W. 146; 15 S. 334.

Cited by the Court, 1 Barr, 373.

[SUNBURY, JULY 3, 1829.]

Miller against Hower.

IN ERROR.

Part performance will take a parol contract out of the statute of frauds. A verdict in debt, finding no specific sum, is void.

ERROR to the Court of Common Pleas of *Columbia* county.

Debt on a single bill, which came before the court below, on an appeal from the judgment of a justice of the peace.

On the trial, a verdict was given in favour of the plaintiff, but for no specific sum. It will be seen by reference to the opinion of this court, that the facts came up so obscurely and indistinctly, as to render it difficult to decide on the merits; but that, if the verdict had been correctly entered, the judgment below would have been affirmed.

Frick, was concerned for the plaintiff in error, and *Grier*, *contra*.

The opinion of the court was delivered by

HUSTON, J.—This case came up on the writ, statement, pleas, charge of the court, and verdict and judgment; and errors were assigned to the charge of the court, and to the verdict and judgment. The evidence, which was principally parol, was not part of the record. There are few cases in which an abstract principle of law is disputed. The contest is, generally, whether the facts and circumstances of the case bring it within the principle; or, when the first general view of the facts would seem to bring it within the effect of a settled principle, whether there is not some fact or circumstance, which will make it an exception. Hence, generally, the charge of the court is, by the judge [*54] given, and by the jury, understood, as *applicable to the case trying; but, when the charge is brought under revision, and the superior court has not before it the facts to which it was applied, it is often difficult to decide whether there was error in the law, as stated to the jury, or not. And, perhaps, the safe rule to be adopted, and the one most consonant to the principles of our system, is, to consider the charge as correct, if there is any colour for supposing it to have been applied to a case in which it would be agreeable to law. In some districts, judges have refused to put their charge on the record, until the evidence to which it is applied is made out by the party

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objecting, and submitted to the counsel of the adverse party, and agreed to be correct; and, if the counsel do not agree, the testimony is settled as correct, by the judge. But, as this gives some trouble to counsel, it is often, and in some districts almost always, omitted. We are, then, to take the facts as stated in the charge; but, this does not generally purport to give even a full abstract of all the evidence; and then we have, what occurred in this case, the statements of counsel—not always agreeing, in every respect, with each other, or with what little part of the evidence is referred to in the charge.

As far as I could ascertain, this cause presented something like the following case: S. Hower and William Scott were brothers-in-law of the defendant below, G. Miller. For some cause, he, Miller, had given several notes, which being the property of Hower and Scott, were divided between them. Hower brought suit, and obtained judgment, for a part of his notes, about 1821 or 1822. The defendant alleged, and proved, that he and Scott agreed, that he, Miller, was to convey to Scott a certain quantity of land, which Scott agreed to accept, in discharge of his notes on Miller. That, after this, Scott refused to comply with the bargain, unless Miller would give an additional quantity of land, and Miller agreed to do so. So far, the judge says, was admitted to be the case, by both parties. Whether Scott at this time took possession, and retained it, did not appear; the charge says nothing as to this fact; and the counsel positively differ. At this time, in 1821, Hower had a judgment, which bound Miller's land; and, to enable Miller to make the deed to Scott, Miller gave Hower a mortgage on other lands, to secure the amount of this judgment; but satisfaction was not entered on the judgment, and the parties, ignorantly supposing it was extinguished by the mortgage, immediately on giving the mortgage to Hower, Miller made and tendered a deed to Scott, for the land sold and surveyed off to him. This he refused to accept; and, at the trial, alleged Hower's judgment as an incumbrance. It is said, we know not whether correctly, or not, that at the time he objected for a very different reason, and that, if this objection had been made, Hower would have at once entered satisfaction, or released; but no evidence is before us on this point.

After this, as Scott's notes fell due, he sued one, and got a judgment by default against Miller. A second became due; he sued it, *and Miller confessed judgment on it. Scott [*55] levied an execution on one of these judgments on the land set out for him by Miller, a deed for which he had refused, and bought it for a sum less than the amount of one of the notes. The present suit was on another of Miller's notes,

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which had been allotted to Scott; and the defence attempted was, the contract to take land for the whole four notes; and that it had been measured off for him, possession taken, and a deed tendered. Scott then gave in evidence Hower's judgment, as an incumbrance, which justified him in refusing the deed; and alleged, the whole contract was rescinded, by the consent of both parties; and, as evidence of it, showed the judgment by default, and the judgment confessed by Miller, on another note; and, to be sure, this was very strong evidence that Miller considered the contract about the land at an end;—for why confess judgment on a note which was paid, if the present defence is true? Miller then showed a release of Hower's judgment, executed in 1824; and reciting that the judgment was satisfied in 1821, &c. The judge left the question, whether the bargain was rescinded, to the jury.

Although a contract about the sale of land is fully agreed to in all its details, and a time and place appointed to draw the conveyance, yet one of the parties may change his mind, and for no other reason refuse to execute the conveyance, or to accept it, and pay for the land. And, if this were not so, the statute of frauds, so far as it relates to lands, would be idle, or perhaps absurd. But although this is true, as an abstract proposition, it is not universally true, under all circumstances; for, if the vendee take and keep the possession; if, in consequence of the contract, the vendor go to trouble and expense, to enable him to complete his title; if he sells, to enable himself to pay his debts, and the vendee gets his property into his possession, and disables him from selling to others; in short, if he makes frivolous excuses for not complying, until he gets the vendor entangled in difficulties, for the dishonest purpose of getting the same land at an undervalue, the law may be otherwise, and he may be held bound by a parol contract; which has been partly carried into effect by the other party, by delivering possession, &c., and which the vendee evaded, for an improper purpose, though he still retained the possession. I do not say that there is evidence of such conduct, by Scott, in this case; we only know, in this court, a part of these transactions. On the facts stated, in the charge of the court, there is no error in the charge; it is, however, apparent, that the question, whether possession was given to Scott, and retained by him, is a most material one; but it is not a ground for reversing, except in a very singular case, that the judge did not advert to every point in the cause, unless counsel have requested an opinion on the point omitted.

But there is another point, on which this cause must be remanded. The action was debt, on a single bill. The jury found

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a verdict for the plaintiff—no sum in favour of the plaintiff is found. It is useless *to talk about judgment for default of plea, or by *nil dicit*, &c. There, a writ of inquiry [*56] will ascertain the sum, or it may be done by the officer of the court; but who ever heard of a writ of inquiry of damages, or the sum being ordered to be ascertained by a prothonotary, after a jury sworn at the bar, trying the cause, and giving a general verdict? It may appear, at first view, a formal or technical objection; but, if tolerated, it would render nugatory an important clause of our act about defalcation; which expressly says, that if any part be paid, it shall be defalked, and the plaintiff shall have judgment for the residue only. It would change our whole system, and render a jury useless, in more than half the suits in court. It is admitted, such a verdict would not have been received, if it had not been given at a time when the President was absent.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 6 Wh. 160; 6 W. 393; 9 W. 107; 1 W. & S. 555; 7 Barr, 422; 8 H. 483; 12 H. 36; 11 H. 503; 5 N. 53; s. c. 5 W. N. C. 142.

Cited and approved by the Court, as to the invalidity of the verdict, 8 W. & S. 47.

[SUNBURY, JULY 3, 1829.]

Willard and Another *against* Norris and Another.

IN ERROR.

When land, subject to a mortgage, is sold under a judgment, obtained subsequently to the execution and recording of the mortgage, the purchaser at sheriff's sale, takes the land discharged of the lien of the mortgage.

It is not error to permit a *scire facias*, to revive a judgment to be amended, even after the plea of *nul tiel record* pleaded.

UPON a writ of error to the Court of Common Pleas of Tioga county, the case was thus:—

On the 22d of December, 1815, Lyman Adams purchased of Elias Boudinot, a tract of land in Tioga township, Tioga county, containing one hundred and seventy-six acres and fifty-nine perches, which he mortgaged on the same day to Joseph P. Norris and David Lenox, to secure four hundred and ninety-three dollars and eighty-three cents, the purchase-money. Robert Tubbs, for the use of John Joseph, recovered a judgment against Lyman Adams and others, for sixty-six dollars and thirteen cents, before John Ryan, Esq., a justice of the peace for

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Tioga county, on the 17th of July, 1817, which was entered on the docket of the Court of Common Pleas of *Tioga* county, for the purpose of binding the real estate of the defendants, on the 28th day of April, 1819; and the land purchased of Elias Boudinot, and mortgaged to Joseph P. Norris and David Lenox, was levied upon by virtue of a writ of *fiery facias*, issued upon it to May Term, 1819. The mortgage to Norris and Lenox, was recorded on the 25th of June, 1819; but this fact appeared only by the certificate of the recorder, for it is not alleged in any of the pleadings in the case, that the mortgage was upon record, *nor was it given in evidence in the court below, so [*57] far as appears by the record. Norris and Lenox issued a *scire facias* upon the mortgage to them, and on the 19th of September, 1822, obtained judgment in the Court of Common Pleas of *Tioga* county, of September Term, 1822, against Adams; and on the 23d of September, 1825, they issued a *scire facias*, *post annum et diem*, against Adams, to revive the judgment obtained on the 19th of September, 1822.

Bartlett Seely obtained judgment in the Common Pleas of *Tioga* county, on the 19th of August, 1826, against Lyman Adams and others, and under the execution issued upon this judgment, Adams' land, so as aforesaid mortgaged to Norris and Lenox, was sold on the 19th of December, 1826, to William Willard, Jr., to whom, on the 17th of February, 1827, the sheriff, in open court, and after proclamation, acknowledged a deed. On the 21st of September, 1827, the money arising from the sale to Willard, was ordered by the court, after a hearing, to be paid over to the holder of the judgment obtained by Tubbs, before the mortgage to Norris and Lenox was recorded.

Judgment by default was entered in the action of *scire facias post annum et diem*, brought by Norris and Lenox, on the 21st of December, 1827, and a *levary facias* was issued to February Term, 1828, to sell the land in possession of William Willard, Jr.; but upon his application, the default was set aside, and Willard was admitted as a co-defendant in the action. Willard, then, severally pleaded *nul tiel record*; upon which issue was joined on the 18th of February, 1829. Willard, also, on the same day, pleaded the following plea:—

“William Willard, Jr., for a further plea in this behalf, by leave of the court here for this purpose first had and obtained, according to the form of the statute, in such case made and provided, saith, that the said Joseph P. Norris, who sued with the said David Lenox, since deceased, ought not to have execution of a certain tract of land in *Tioga* township, in the said county, containing one hundred and seventy-six acres, and fifty-nine perches; purchased by the said Lyman Adams, of Elias Boudi-

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not, on the 22d day of December, 1815, now in the possession of the said William Willard, Jr., by his tenant, Andrew Pickard, being the same land described in a *scire facias*, upon a mortgage to secure the purchase-money of the said land, issued to December Term, 1821; because he says, that heretofore, to wit, on the 15th day of February, 1819, a transcript of a judgment, for the sum of sixty-six dollars, and thirteen cents, in favour of Robert Tubbs, for the use of John Joseph, against the said Lyman Adams, James Cowt, and Benajah Ives, rendered by John Ryan, Esquire, on the 23d day of July, 1817, then one of the commonwealth's justices of the peace, in and for the county of Tioga, aforesaid, was entered on the docket of the Court of Common Pleas, of the said county, for the purpose of *binding the real estate of the said defendants, for the said debt and costs, according to law: That afterwards, to wit, on the 28th day of April, 1819, it was so proceeded by the said court on the said transcript of a judgment, that the said tract of land, and appurtenances, were levied on the sheriff of Tioga county, by virtue of a certain writ of *fieri facias*, issued on the said judgment, returnable to May Term, in the year last as aforesaid, as by the record and proceedings in the said suit in the said court remaining will more fully appear: That afterwards, to wit, on the 19th day of August, 1826, Bartlett Seely, assignee of Elijah Stiles, Esq., by the consideration of the Court of Common Pleas of Tioga county, recovered a judgment against the said Lyman Adams, Jeremiah Brown, and Pliny Power, for the sum of one hundred and fifty-six dollars and eighty-two cents, together with costs. That it was so proceeded, on the said judgment, by the said court, that the sheriff of Tioga county, by virtue of certain writs of *fieri facias* and *venditioni exponas*, afterwards, to wit, on the 19th day of December, 1826, after giving legal and timely notice, exposed the said tract to public vendue, and sold the same to William Willard, Jr., for the sum of fifty dollars, he being the highest bidder, and that the best price bidden for the same: That afterwards, to wit, on the 17th day of February, 1827, after due proclamation made, John Beecher, Esq., then the said high sheriff of the said county, acknowledged his deed to the said William Willard, Jr., for the said tract of land, in open court, according to law. That afterwards, to wit, on the 21st day of September, in the year last aforesaid, the said Court of Common Pleas, pursuant to the statute, in such case made and provided, ordered the money raised by the said sheriff, arising from the said sale of the said tract of land, to be paid over to the said Robert Tubbs, for the use of John Joseph, to be applied to the said judgment, in his favour, against the said Lyman Adams, James Cowt, and Benjamin Ives; all

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which, by the records and proceeding in the said court remaining, will more fully appear. And the said William Willard, Jr., in fact saith, that the said Lyman Adams hath acquired no right whatever in the said tract of land, since the levy and sale last aforesaid. And this the said William Willard, Jr., is ready to verify. Wherefore he prays judgment, &c."

To this plea, there was the following replication :—

"And the said plaintiff, &c., as to so much of the second plea, by the said defendant, William Willard, Jr., pleaded, as alleges, 'that the said Joseph P. Norris, who sued with David Lenox, since deceased, ought not to have execution of a certain tract of land in Tioga township, in the said county, containing one hundred and seventy-six acres and fifty-nine perches, purchased by the said Lyman Adams, of Elias Boudinot, on the 22d day of December, 1815, now in the possession of William Willard, by his tenant, Andrew B. Pickard,' saith, that the said plaintiff [*59] ought to have execution *of the land described in the *scire facias*, issued to obtain the judgment upon which his action in this behalf is founded ; because, he says, that those lands are the same which Lyman Adams bought of Elias Boudinot, and received a deed for the same, of Joseph P. Norris, and David Lenox, the attorneys in fact of the said Elias Boudinot, who forthwith took of the said Lyman Adams a mortgage for the consideration, or purchase-money, of the said land ; upon which said mortgage the original judgment in this behalf was obtained. And the said plaintiff claims execution of no lands other than those described in the said mortgage. All which he is ready to verify, &c."

To this replication, the defendant, Willard, demurred, and the plaintiff joined in demurrer. On the 18th of February, 1829, on motion of the plaintiff's attorney, the court permitted the *scire facias* to be amended, so as properly to recite the judgment of September Term, 1822, instead of December, 1821, which had been inserted.

In May, 1829, after argument, the court below gave judgment for the plaintiff, Norris, on the demurrer, and on the issue of *nul tiel record* ; to which opinion the defendant, Willard, excepted, and took his writ of error.

The errors assigned in this court were, that the court below erred :—

1. In allowing the *scire facias* to be amended, so as to recite a judgment of a different term from the one first recited.

2. In deciding, that the land sold by the sheriff to Willard, was, under the circumstances disclosed in his plea, liable to be again sold at the suit of a mortgagee, whose mortgage was not

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recorded within the period required by law ; upon which, judgment had been obtained, prior to the sheriff's sale.

3. In deciding, that a judgment on a *scire facias*, upon a mortgage of a particular tract of land, was a general judgment against the person, and all the goods, chattels, lands, and tenements, of the mortgagor, upon which a general execution might issue.

4. In deciding, that the plaintiff's replication to the special plea of the defendant, Willard, was sufficient.

Lewis, for the plaintiffs in error.—The important question on this record is, whether the sale on the judgment did not extinguish the mortgage, as against the purchaser of the land, and substitute the fund raised by the land itself ; out of which fund, all incumbrances were to be paid, according to their priority. In this case, the money raised by the sale went to a judgment creditor ; against whom, this mortgage, not recorded until after his judgment was obtained, was a nullity. *Semple v. Burd*, 7 Serg. & Rawle, 286. In Pennsylvania, land can never be subject to more than one judicial sale, upon incumbrances of any kind, existing at the time of such sale ; and hence, though a creditor may have several securities, such as a bond, and a mortgage, and judgments on them, he cannot sell *the land [*60] twice. 9 Serg. & Rawle, 304. "By the uniform practice of this state, both before and since the Revolution, no difference is effected by sales being had under early or late mortgages or judgments. A *venditioni exponas*, under a late judgment, has always been considered a sufficient authority to the sheriff to sell lands discharged from former incumbrances, even though intermediate judgments could not be paid off on the actual sale." Per *Lewis*, *arguendo*, 2 Yeates, 45. Per *Tilghman*, C. J., 3 Binn. 358. Whatever may be the doctrine in England, here, the mortgagor, as regards third persons, and even as regards the mortgagee, is deemed the owner of the land : he is seized of the legal estate, and the mortgage is but an incumbrance. The extent to which the principle has been carried by our courts, may be collected from *The President, &c., of the Schuylkill Navigation Company v. Thoburn*, 7 Serg. & Rawle, 411. It is true, that the mortgagee may maintain ejectment ; and, in consequence of the defective organization of our courts, his administrator, or the assignee of his administrator, may do so ; but that is between the parties themselves. *Simpson's Lessee v. Ammons*, 1 Binn. 175. Here the question is between third persons, one of whom is a *bona fide* purchaser under a judicial sale, not bound to look to the application of the purchase-money. The case of *Febiger's Lessee v. Craighead*, a short and imper-

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fect note of which is to be found in 4 Dall. Rep. 151, but which is fully reported, 2 Yeates, 42, was the case of a mortgage to the Trustees of the Loan Office, under the act of assembly, of February 26th, 1773, (Prov. Laws, 478, sect. 16,) the provision of which secured a priority, and preserved the lien, notwithstanding the sale under a subsequent judgment. So by consent of the purchaser the lien may remain. *Stackpole v. Glassford*, 16 Serg. & Rawle, 163. But, if it be conceded, that a mortgage is but an incumbrance on land as against third persons, then the question in this case is settled by *Nichols v. Postlethwaite*, 2 Dall. 131, and *Barnet v. Washebaugh*, 16 Serg. & Rawle, 410, in which cases it was decided, that, where a legacy is charged upon land, the sheriff's vendee under a judgment obtained against the devisee of the land, takes the land discharged of the lien of the legacy, and the legatee must look to the proceeds of sale, in the sheriff's hands. The reasoning of the court in this case is conclusive.

As to the other point, a *scire facias* is not in general amendable; and it is never so where advantage has been taken of an error in it, by pleading *nul tiel record*. 2 Tidd, (Farr. Edit.) 1036, 1037, note (d.)

Williston and *Mallory*, for the defendant in error, were desired by the court to speak only to the question, whether the mortgage was discharged by the sale. They argued, that a mortgage creates a specific lien upon land, indefinite in its duration, and is so far from being a mere incumbrance, that in a [61] court of law it has never been considered as anything but a conveyance of the land itself. The mortgagor has parted with his legal title as between himself and the mortgagee; and it is contrary to good faith, as well as a legal anomaly, to permit him who has created a specific lien, and parted with his legal estate in order to do so, indirectly to procure a sale of the land, and defeat his creditor, by the subsequent creation of a mere incumbrance. All confidence in mortgages, as securities, will be destroyed, by such a decision; and it is well known, that immense sums have been loaned in the city of Philadelphia, where these mortgagees lived, and elsewhere, upon the faith of the opinion, that they remained liens upon land sold under subsequent judgments. It is true, that, because money has been raised by a pledge, the owner of the land, or chattel pledged, does not, therefore, cease to have power to borrow more, or create other liens upon it; but the only mode by which the subsequent creditor can secure himself is, to pay off the prior lien; and hence, in England, where there are several mortgages, on the same estate, one behind another, the order in which the

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mortgagees will be let in to redeem is, that the second do redeem the first, the third the second, and so on.* “The principle is believed to be universal,” says Marshall, C. J. (*Rankin v. Scott*, 12 Wheat. 179,) “that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced, by some act of the party holding it, which shall postpone him in a court of law or equity, to a subsequent claimant. Take the common case of mortgages. It has never been supposed, that a subsequent mortgagee could, by obtaining and executing a decree for the sale of the mortgaged premises, obtain precedence over a prior mortgage, in which all the requisites of the law had been observed. If such decree should be made, without preserving the rights of the prior mortgagee, the property would remain subject to those rights in the hands of the purchaser.” Chief Justice Tilghman, in *Moliere’s Lessee v. Noe*, 4 Dall. 450, was of opinion, and Judge Yeates and Brackenridge concurred with him, that, under a sale by order of the Orphans’ Court, for the payment of debts, though the purchaser took the land discharged from the lien of judgments, yet, that a mortgage “stood upon a different footing from judgments, because the mortgagee is, strictly speaking, the owner of the land, and may recover it in ejectment; the mortgagor has no more than an equity of redemption; and the Orphans’ Court has not power to sell a greater estate than he is possessed of.” And the ground upon which he refused to interfere, to assist the mortgagee to take the amount of his mortgage, out of the money in court, in *Patterson v. Sample*, 4 Yeates, 308, where lands subject to a prior mortgage had been sold under a subsequent judgment, was, because “the mortgagee had a plain and simple remedy *on the mortgage.” In this opinion, Judge Bracken- [*62] ridge united with him; and Judge Smith openly stated his opinion to be, “that no sale under a later judgment, can affect prior judgments, unless they are fully paid by the sale.” Judge Brackenridge never gave up his opinion; which, he says, was that of Chief Justice Shippen, and has left his protest against the doctrine now contended for. *Law Miscellanies*, 258. Judge Yeates, it is true, did not go so far (2 Binn. 218; 4 Yeates, 316,) as the other judges. *Febiger’s Lessee v. Craighead*, 2 Yeates, 42; 4 Dall. 151; is a direct authority, that a mortgage does remain a lien on land sold under a subsequent judgment; for the provisions of the act of assembly, of February 26, 1773, gave no greater estate to the trustee of the Loan Office, than passes to every mortgagee; to wit, the fee simple, subject to a

* See Patch’s Law of Mortgages, 192.

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condition. Mr. Dallas's report of it shows how the decision was understood when it was made. The uniform practice stated by Mr. Lewis in Judge Yeates's report of that case was denied by Mr. Ingersoll, who asserted then, what we now say is the law.

The legislature seem to have been impressed with the same idea; for though they have interfered and restricted the lien of judgments, they have left mortgages upon their original footing. Nor is a mortgage given before, but recorded after a judgment is confessed, to be treated by the judgment creditor as a nullity, and, where he has notice of it, he must so regulate his sale as not to prejudice the mortgagee. *Muse v. Letterman*, 13 Serg. & Rawle, 167. The practice of permitting a younger judgment creditor to sell, and apply the fund, is but a more direct mode of permitting him to redeem a prior incumbrance to save himself. He has a right to pay off the prior liens, and repay himself out of the land; which being ultimately responsible to all creditors in their order, by our practice is rendered immediately available; the principle of equity being, that the party, or fund, ultimately liable to pay, equity renders immediately liable. *Nichols v. Posthlewate*, was but a *Nisi Prius* decision, only reported in Dallas's Reports; and the point there and in *Barnet v. Washebaugh*, was different from that now before the court. The party who owned the land sold under the judgments did not create himself the prior lien. In *Nichols v. Posthlewate*, the money was in court to pay the legacy, if a lien, which was the sole question; there was nothing decided, nor any decision called for, as to what the condition of the purchaser was, after the sale; and though the decision, upon the facts, in *Barnet v. Washebaugh*, the report of which is very unsatisfactory, is right, yet the opinion of the court there delivered was uncalled for; as a very different principle would have prevented the plaintiff's recovery in that case.

The opinion of the court (HUSTON, J., being sick, and absent,) was delivered by

TOD, J.—The record presents the following case: In September, 1822, Lenox and Norris obtained a judgment [*63] against Lyman Adams in *scire facias*, upon a mortgage, executed by Adams to them. This mortgage, though executed on the 22d of December, 1815, was admitted not to have been recorded until the 25th of June, 1819. In September, 1825, Lenox and Norris brought the present action of *scire facias*, to revive their said judgment, *post annum et diem*. After there had been judgment by default against Adams, in this second *scire facias*, Willard moved the court to open the

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judgment, and let him, Willard, into a defence, which was done. The two defendants then, pleaded separately, *nul tiel record*, upon which issues were joined. Willard also pleaded a further plea, in which, and in the replication to it, all the facts of this case are contained.

[His Honour here read Willard's plea, and the plaintiff's replication.]

To this replication, the defendant, Willard, demurred generally, and the plaintiff joined in demurrer. The judgment of the court was in favour of the plaintiff below, and the defendant took this writ of error, and now assigns the following errors:—

[His Honour here read the errors assigned.]

In the second writ of *scire facias*, there was a mistake in reciting the term of the original judgment; which the court, on the request of the plaintiff below, permitted him to amend. This amendment, and the decision of the court upon the plea of *nul tiel record*, produced a bill of exceptions from Willard's counsel; but the first error assigned, has not been insisted upon here in argument, and we dismiss the matter at once; being of opinion, that the court clearly had the power to permit the amendment of the *scire facias*.

The judgment on the first *scire facias* was confessed by the defendant, Lyman Adams, on the 17th of September, 1822. The amount of it was settled at three hundred and thirty-six dollars and sixty-three and a half cents. The mortgage produced was of the date already mentioned, to secure payment of a bond of nine hundred and eighty-seven dollars and sixty-six cents, conditioned for the payment of four hundred and ninety-three dollars and eighty-three cents. On what day, or from what time interest was to be paid, does not appear. Thus it appears, that the judgment, upon which the land was sold by the sheriff, was subsequent to the recording of the mortgage of the plaintiff below; but the judgment, towards satisfaction of which, the money was applied by the sheriff, was prior to the mortgage. There was judgment entered on the mortgage long prior to the sale by the sheriff, and against that sheriff's sale there was no allegation of fraud. As to the distinction which has been made, depending upon the fact, that though the land was actually sold upon a later judgment, yet that the money raised by the sale was appropriated to a judgment entered prior to the recording of the mortgage, it was not much pressed in the *argument, and we shall not rely [*64] upon it in the decision. Then, on this general demurrer, the question comes up directly, whether the title of a prior mortgagee, and the lien of his mortgage, are divested and

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extinguished by a sale of the land under a younger judgment. Perhaps it is a question which now comes for the first time before this court for a direct decision. Yet, I apprehend, that incidentally and indirectly, it has often arisen, and often been decided. I have endeavoured to make a collection of all the cases bearing upon the subject, from Yeates and Binney's Reports, to *Barnet v. Washebaugh*, 16 Serg. & Rawle, 410. Most of these cases were cited in the argument.

In *Petry v. Beauvarlet*, 1 Binn. 97, decided in 1804, there was a rule on the sheriff to bring money into court, to which he made return, "that with the money he had paid off several judgments and mortgages upon the premises sold, which being prior to the judgment in this case, were entitled to prior satisfaction; and, that he had charged a poundage upon the different sums so paid."

Per Curiam.—"The construction of that clause, (viz., of the fee bill,) has uniformly allowed to the sheriff poundage upon the payment of all prior judgments and mortgages. He must, therefore, take his costs."

That this decision was accordant with the sense of the community and of the bar, is strongly shown by the case of *Browne v. Browne*, 1 Browne's Rep. 97, where some contested items in a sheriff's bill of costs were referred to two gentlemen among the most practical and experienced of the profession. The sheriff had sold land under the act of assembly of the 11th of April, 1799, after the execution of a writ of partition. Objection was made to an item of ten dollars and some cents, charged and paid by the sheriff for searches of judgments and mortgages. The referees approved the charge, and gave these reasons:—"It appears to us necessary, for the sheriff's security, to make these searches, as he could not safely distribute the money arising from the sale among the parties without ascertaining what liens are upon the estate. We have no doubt, that the sheriff is entitled to a reasonable and proper allowance for the trouble, risk, and responsibility, in performing this duty; and we can perceive no difference in any of these respects, between such a sale as this, and a sale under judgment and execution. This opinion seems to be sanctioned by the case of *Petry v. Beauvarlet*, in the Supreme Court, wherein the court allowed poundage to the sheriff on the payment of the judgments and mortgages prior to the judgment and execution on which the defendant's land was sold, although the fee bill declares, that no poundage shall be paid for more than the real debt, and also declares it to be illegal for any officer to demand greater fees than are specified in the act of assembly, for any service to be done by him; but does not notice the poundage on payment of

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such judgments and mortgages prior to the plaintiff who sells." This award was confirmed by the court, with the *approbation of all, as far as appears. Even though this case [*65] should not be held as a precedent in law, yet it seems to me, nothing can more clearly show how notorious is the rule, that in every judicial sale in Pennsylvania, the land goes to the purchaser clear of all liens of judgments and mortgages, and that out of the purchase-money, the sheriff, at his own risk, is to pay off all those liens, according to their priority, insomuch, though the act of assembly, about partition, make no mention of liens, yet by mere analogy, drawn from the notorious usage of the commonwealth, an allowance was adjudged, in this case, to the sheriff, for the fees paid for searches of judgments and mortgages, the owners of which might afterwards call upon him for their money. I refer also to *Shoemaker v. Houtford*, 1 Browne's Rep. 251.

In the case of *The Bank of N. America v. Fitzsimons*, 3 Binn. 358, Tilghman, C. J., says, "it has been a practice of long standing in this state, where the sheriff sells land by virtue of an execution to sell it for its full value, and apply the money to the discharge of those liens." The consequence was, that the sheriff retained the money in his hands till he could ascertain the amount of old judgments. In *Wall v. Lloyd's Executors*, 1 Serg. & Rawle, 320, Tilghman, C. J., says, "I know, that by the practice of this court, sheriffs have been allowed poundage out of the money they pay, not only for the satisfaction of the debt of the plaintiff in the execution, but also of other judgments by which the land was bound." And in the same case, Yeates, J., says, "This court has determined, *Petry v. Beauvarlet*, 1 Binn. 97, that the construction of the act of assembly of the 25th of April, 1795, uniformly has been, to allow the sheriff poundage upon all prior judgments and mortgages. And I take it, that the uniform practice for fifty years past, has been, that the sheriff has been allowed poundage for all debts which he has paid on sales." The case of *Nichols v. Postlethwaite*, 2 Dall. 131, would, I apprehend, if any question were yet remaining as to the usage of Pennsylvania, requiring all liens to be paid on sheriff's sales, end the doubt. There it was expressly decided, that legacies charged by will, on lands sold by the sheriff on a subsequent judgment, should be paid out of the purchase-money, which goes far beyond any payment of a prior mortgage. It is argued, that this is but a *Nisi Prius* decision, and that the same case is not at all mentioned in Yeates's Reports. As to authority, the judges appear to have been Bradford and Shippen; and Judge Yeates reported no decision, made at a circuit where he did not attend. Besides, the decision in *Nichols v. Postlethwaite*, is cited with

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express approbation by Duncan, J., in *Gause v. Wiley*, 4 Serg. & Rawle, 535, by Tilghman, C. J., in *The Commonwealth v. Alexander*, 14 Serg. & Rawle, 263, and by the whole court in *Barnet v. Washebaugh*, 16 Serg. & Rawle, 413, in which the very same point was decided. It appears difficult to state any reason why prior legacies shall be paid out of moneys raised by a [*66] sheriff's sale of the land on which *they are charged, and yet, that prior judgments, or prior mortgages, shall not be paid.

I am not aware of any decision of this court, contradicting the usage which has been mentioned, and which, I think, there is reason to believe, has existed in this state, beyond the memory of man. The incidental *dicta* of the judges, however, have varied very much indeed. Judge Yeates seems to have taken the lead in support of what he deemed the ancient usage; and his reasons, which may be found in the case of *Keen v. Swaine et al.*, 3 Yeates, 561, cannot, in my opinion, be easily and satisfactorily answered. Judge Brackenridge was foremost on the other side. On every occasion he seems to have declared his mind unequivocally, that by a sheriff's sale of lands, all prior liens, whether judgments or mortgages, are left wholly untouched; and he gives his reasons most fully in his *Miscellanies*, page 258; and from some of the *dicta* in the books from the judges incidentally, it seems probable, that one or more of them were of the same opinion with Brackenridge, J. But this, it appears to me, could not have lasted long. In the case of *Patterson v. Sample*, 4 Yeates, 308, there was a mortgage, and the land having been sold under a subsequent judgment, there was an application by the mortgagee to receive his money from the sheriff. The case was heard before Smith, J., and the only ground upon which that judge seems to have placed the case was, the recording of the mortgage deed within six months. The later cases on the subject are still more conclusive. In *The Commonwealth v. Alexander*, 14 Serg. & Rawle, 257, it was decided, Tilghman, C. J., pronouncing the opinion of the court, not only that a prior judgment was to be paid out of the purchase-money accruing from a sheriff's sale, but that a judgment still older, and against another person, who had been the preceding owner of the land, should also be paid. Then, as to mortgages: in *McCall v. Lenox*, 9 Serg. & Rawle, 302, the land was sold on a judgment. Without any question, as far as appears, the money was applied by the sheriff to the satisfaction of a mortgage, and the residue, as far as it would go, to a second mortgage, both mortgages being prior to the judgment. The last two cases are full of other matter, leading, as it seems to me, to the same conclusion. That a mortgage is but a record evidence

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of a debt, and entitled on this question to no prerogative whatever above a judgment, independent of the express authorities cited, I refer to *Wentz and Wife v. De Haven*, 1 Serg. & Rawle, 312, and *Porter's Executor v. Neff*, 11 Serg. & Rawle, 223. Other cases might be cited to the same purport, but it seems to be unnecessary.

Judgment reversed, and judgment for the plaintiffs in error on the demurrer.

Cited by Counsel, 3 Wh. 463; 7 W. 478; 10 W. 346; 6 W. & S. 282; 7 Barr, 432; 1 J. 286; 6 H. 218; 7 H. 33; 10 C. 64; 11 C. 186; 12 C. 468; 2 Wr. 386; 3 Wr. 141; 6 Wr. 194; 17 S. 346; 11 N. 121.

Approved and followed in, 1 Penn. R. 49; and re-affirmed in, 3 R. 126.

Cited by the Court, 3 Penn. R. 244; Bald. 284; 5 Wh. 185; 6 Wh. 357; 4 W. 398; 7 W. 478; 8 W. 297; 3 W. & S. 12; 2 Barr, 265; 10 Barr, 480; 1 J. 260; 2 J. 217; 1 H. 205; 12 C. 148; 7 S. 396; 4 O. 68; s. c. 11 W. N. C. 520.

See note on this subject in 3 Rawle, 167.

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[*67]

Hess *against* Hess for the Use of Evans and Wife.

IN ERROR.

It is error, when an action is brought for the use of another, and the nominal plaintiff dies, to swear the jury, and try the cause in the name of *cestui que use*.

ERROR to the Court of Common Pleas of ——— county.

Frick was of counsel for the plaintiff in error, and *Marr*, for the defendants in error.

The opinion of the court was delivered by

TOD, J.—This action of debt was brought in the court below by William Hess, as plaintiff, for the use of John Kyle, Sen., against the plaintiff in error. John Kyle's name was struck out on application to the court, and the names of Evans and his wife substituted. When the cause was reached, on the trial list, the death of William Hess, the plaintiff, was suggested; and the defendants' counsel alleged that a legal plaintiff must be substituted before the cause could be tried; and that not knowing of the death of the plaintiff they were unprepared, &c. The court ordered the jury to be sworn; and the cause, leaving out the name of William Hess, was tried in the names of James Evans and Ann his wife, as plaintiffs.

It seems very clear that if this cause was rightly tried, and the jury rightly sworn in the names of Evans and wife, as

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plaintiffs, then the action might have been sustained, had it been brought originally in the names of Evans and wife. It cannot well be said that a cause requires more precisely legal parties at its commencement than at its trial. What was done in this case it is said to be the practice. But to support this practice we must say that an assignee, or donee, of a chose in action, may sue in his own name, contrary to the common law, and contrary to the statute law: for the act of assembly, (Purd. Dig. 97,) permitting bonds and specialties to be sued upon by an assignee, when assigned with certain specified formalities, appears conclusive to show that without such formalities they cannot be sued upon by an assignee. A practice that bonds, specialties, and simple contracts may be sued on in any name whatsoever, may, perhaps, produce much mischief. But whether productive of mischief or not, it is a change in the law which, in my opinion, nothing short of legislative authority is competent to effect.

Judgment reversed.

Cited by Counsel, 5 Wh. 180.

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Seckel against Engle and Another.

IN ERROR.

Testator devises to one child a tract of land, and afterwards devises to another child a larger tract, held by an older title, and which embraces within its boundaries the whole of the tract first devised: Evidence is inadmissible on the part of the first devisee to show that the title to the larger tract was defective.

Under such circumstances, the two devisees take the smaller tract together, as tenants in common.

ERROR to the Court of Common Pleas of *Union* county, in an ejectment brought by Henry Seckel against John Engle and John Guier, to recover ninety-four acres and three-quarters of land in Penn township.

George Cooper being seised of lands in *Union* county, devised to his daughter, Sophia Seckel, for life, remainder in fee to her children, "a tract of land in Penn township, surveyed to George Cooper," and afterwards devised to his daughter, Dorothy Guier, "also a tract of land in Penn township, called Nicatenslin, granted to me by patent, recorded AA. vol. 14, p. 234."

The first-mentioned tract contained ninety-four acres and

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three-quarters, and was patented to the testator August 30th, 1786; the second tract contained three hundred and fourteen acres and one hundred and one perches, and had been patented to him March 21st, 1774; but it appeared that the whole of the smaller patent was included within the bounds of the larger.

The plaintiff offered to prove that the patent of 1774 was obtained by misrepresentation and imposition practiced on the land office; that no survey had been made on the ground, and that there was no warrant authorizing such a survey. The evidence was rejected by the court, who charged the jury that the defendant had shown an older and a better title, and therefore the plaintiff could not recover. Verdict for the defendants.

The argument on the writ of error was conducted by *Lashells* and *Merrill*, for the plaintiff in error, who contended, that they had a right to show that the title to the larger tract was defective. If the testator had no title under the patent of 1774, there was no devise to Dorothy Guier. But, at any rate, Sophia was entitled to half the land in dispute as tenant in common with Dorothy.

Greenough and *Hepburn*, *contra*, argued, that as both parties claimed under George Cooper, the evidence which had been offered was inadmissible, and properly rejected by the court below. The testator certainly intended to give to Dorothy the whole, and not *a part of the large tract. The last devise is to her, and it is well settled that the last devise [*69] shall prevail; 2 Yeates, 525.

The opinion of the court was delivered by

GIBSON, C. J.—Both parties claim under the testator, and it is therefore not competent to either to dispute the original title of the other; so that the evidence to show that the defendant's warrant had not been actually surveyed on the ground, was properly overruled.

As regards the remaining point, the case is a singular one. The testator, erroneously supposing himself to be the owner of two separate tracts of land, (the smaller under a junior title being located by mistake within the survey of the larger,) devises each respectively to one of his daughters; and the question is, whether the lesser tract, being given to both by successive devises, is to be held by them together, or whether the devisee of the older title shall take the whole. The smaller, which is first in the order of disposition, is described as "a tract of land in Penn township surveyed to George Cooper;" and the larger, as "a tract of land in Penn township, called Nicatenslin, granted

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by patent." Hence, an argument that the devisee of the larger tract is to take in exclusion of her sister, not on the old notion of the last devise in a will being the best, but because she is the devisee of the better title, the devise of the smaller tract being void, as it is said, by reason of nothing being left on which it can operate. But, it seems to me, there is a fallacy in supposing that only muniments of title were devised, and that the land itself did not pass except as an accident of the better title. Either title was sufficient to carry the land. The testator could have recovered on the junior title against a stranger, who would not have been permitted to set up another title in the testator himself. So a conveyance of the junior title would have passed her whole estate in the land. Even a devise of it would do the same against the heir; and why not pass a concurrent estate against another devisee who claims under the same instrument? It is difficult, even in imagination, to separate the evidence of ownership from the ownership itself; or to believe that the testator, having the estate in him, though by different titles, intended to give his child nothing but one of the badges of ownership, which might prove to be entirely destitute of value. There cannot be a doubt but that he intended to give the land. It has been said that, without assuming too much, we cannot affirm that he would have given it thus, had he been apprised of its being included in a tract which he designed for another. With equal plausibility might it be said, that he would not have given the larger tract, as he has done, had he been apprised of its containing within it a smaller one which he designed for another. The argument would equally prove both devises void for misapprehension, and thus produce consequences probably further distant [*70] from what he would have directed *with full knowledge of the circumstances, than the apportionment of the loss between the immediate devisees. He might possibly have made a proportionate deduction from all the objects of his munificence: certainly he would not, as proposed, have thrown the whole loss upon one. But these are contingencies on which we cannot speculate. We can apply no other remedy than the rule which gives an undivided interest to each of two successive devisees of the same estate, in the same will. It seems to me, then, there was error in refusing to direct the jury that the plaintiff was entitled to an undivided moiety of the land contained in the lesser survey.

ROGERS and SMITH, Justices, dissented.

Judgment reversed, and a *venire facias de novo* awarded.

Approved in, 3 Penn. R. 459.

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Nourse and Wife *against* M'Cay and Another.

IN ERROR.

Where the question was whether a deed, an exemplification of which had been read in evidence, the original not being produced, was a forgery or not, held, that a book of accounts belonging to, and in the handwriting of the magistrate before whom the deed purported to have been acknowledged, and whose name appeared as a subscribing witness, containing charges against the grantor for the acknowledgment of three deeds only, which had certainly been acknowledged before him, on the same day as that on which the deed in question purported to have been acknowledged, was competent evidence, the magistrate being dead, to show that that deed had not been acknowledged before him.

WRIT of error to the Court of Common Pleas of *Northumberland* county, in an ejectment for ten lots in the town of Northumberland. The plaintiffs in error, Joseph Nourse and Caroline his wife, were the plaintiffs below, and William M'Cay and William A. Lloyd, defendants. It is apprehended that the statement of the case is sufficiently given in the opinion of the court.

The cause was argued by *Greenough* and *S. Hepburn*, for the plaintiffs in error, who cited *Crouse* and another *v. Miller*, 10 *Serg. & Rawle*, 155.

J. Hepburn and *Bellas*, in their arguments for the defendants in error, cited *Salmon v. Rance*, 3 *Serg. & Rawle*, 314; *Vincent v. Lessee of Huff*, 4 *Serg. & Rawle*, 300; *Church Dig.* 406; *Rogers v. Old*, 5 *Serg. & Rawle*, 408; *Smith v. Lane*, 12 *Serg. & Rawle*, 80; *Deal v. M'Cormick*, 3 *Serg. & Rawle*, 345.

The opinion of the court was delivered by

TOD, J.—On the trial a complete title in fee simple was shown in Caroline, one of the plaintiffs, by inheritance from her mother, *Sarah H., who had intermarried with the defendant, [*71] William A. Lloyd. To rebut this, and to show that Mrs. Lloyd, the mother of the plaintiff Caroline, and wife of the defendant Lloyd, had in her lifetime parted with her interest, the defendants produced from the recorder's office of the county, and read in evidence an exemplification of a deed from William A. Lloyd and Sarah H. Lloyd his wife, to Alexander Elliot, in fee simple for eighteen lots, including the property in dispute, and

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for an out lot of twenty-four acres. The subscribing witnesses to this deed were Heath Norbury and John H. Cowden. It was dated the 27th September, 1820, and acknowledged on the same day by both the grantors before the said Norbury as justice of the peace. Also an exemplification of an agreement under the hands and seals of the said William A. Lloyd and Sarah H. Lloyd, apparently written on the same paper, and referring to the aforesaid deed of the 27th of September, 1820, containing a valuation of the twenty-four acres and of the other lots, stating that they were intended for William A. Lloyd, and that as an equivalent he was to build a stone kitchen adjoining the house where Mrs. Lloyd and himself then resided, for the benefit of her and her heirs, and to be worth at least one thousand dollars. The subscribing witnesses to this agreement were Henry Rude and Heath Norbury. It was dated on the same day with the deed; namely, the 27th of September, 1820, and was acknowledged separately from the deed, on the same day, before the same Justice Norbury. The defendants also showed the exemplification of a deed, also indorsed, from Elliot and wife to William A. Lloyd, for the land and lots conveyed to Elliot as aforesaid. To this title set up by the defendants, the answer of the plaintiffs was, that as to the property in question it was a mere forgery; and whether forgery or not, was the only question in the cause. The plaintiff's counsel alleged the matter to be thus: that Mrs. Lloyd, the mother of Mrs. Nourse and wife of the defendant, wishing to convey one of her town lots to Alexander Elliot, a poor man who had rendered her and her family some services, she had the deed drawn by Mr. Chapman, the scrivener; and she, with her husband, executed it in the presence of the two witnesses; and it being a printed form of deed, with wide blank spaces, seventeen other town lots, by short references to number and description, and the twenty-four acres near the town, were afterwards inserted by William A. Lloyd, or by his procurement; and that he, in order to prevent an immediate detection of the fraud, when he had got the deed recorded, with the indorsements which also, as they say, were in part fabricated, had destroyed the originals or secreted them. On this head, and to account for the loss, Lloyd himself proposed to be, and was sworn, and testified as follows:—

“Some time after the trust deed (the deed to Elliot) was executed, I took it to the recorder's office. I do not recollect how [*72] *many years elapsed before I began to make inquiry for this deed. I made diligent search about the house; also among General Muhlenburg's papers. I inquired at the recorder's office, and was told that the title papers were carried away. Can't recollect of whom I made the inquiry. It was

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several years after the deed was recorded. I inquired of Mr. Lazarus. I got Martin Weaver to search the office. If I received the deed at the recorder's office, I don't know what has become of it : whether it was sent to Baltimore with other deeds or destroyed by the vermin. I have searched since, within two years, and last week. I have caused no search to be made in the recorder's office since this trial. Cross-examined. I began to search after I heard of the plaintiff's intention to bring this ejectment."

To support this charge of forgery, and to controvert it, a very great deal of evidence was offered by the plaintiffs and by the defendants, on the weight of which we shall neither give nor form an opinion. Among the rest, a piece of evidence was offered by the plaintiffs, objected to by the defendants, and overruled by the court. It was a book of accounts, proved to have been Justice Norbury's, who is now deceased, and in his handwriting. In it he appears to have entered at one time, three charges of twenty-five cents each, against William A. Lloyd, for taking three acknowledgments of deeds from Mr. and Mrs. Lloyd, one to Charles Maus, another to W. Fisher, and another to Alexander Elliot. The deed to Maus, and that to Fisher were produced on the trial, and they both appear to have been executed on the same 27th of September, 1820, and to have the same subscribing witnesses ; namely, Heath, Norbury, and John H. Cowden. The plaintiff's counsel allege that it was material to show this account and book of Norbury, a subscribing witness. They say the deed derives authenticity from Norbury's signature ; and that the deed to Elliot, as now produced, with another deed upon the back of it, and both apparently acknowledged on the same day, before the same justice, if they had both existed so at the time, and had not been altered and fabricated since, they would both have been charged in the same book, and that entering but three acknowledgments against William A. Lloyd, on that day, forms a strong ground to presume that only three acknowledgments were taken on that day which could be chargeable to him. They say, too, that forgery of deeds for land must often go undetected, unless by circumstances ; because the law necessarily gives the advantage of destroying the original, actual forgery, and of relying upon a copy from the recorder's office : a privilege which other forgeries cannot have, because the law insists upon the production of the writing itself, and will not tolerate a copy, unless upon the strictest proof of the loss of the original. They contend further, that Norbury, the subscribing witness to the deed, and to the agreement indorsed, though dead, yet his handwriting

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[*73] *supports the instrument; therefore his declarations, oral or written, are admissible in evidence, so far only as to controvert any deduction which may be drawn from his signature.

We are all of opinion that these reasons of the plaintiffs' counsel are valid; and that it was error to reject the entry in the book of Justice Norbury. I may add, though the evidence of the book was competent, it by no means follows that it was either conclusive or weighty. By itself it would appear very slight.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 2 Wh. 463; 3 Barr, 196; 9 H. 66; 5 S. 358.

[SUNBURY, JULY 3, 1829.]

The Commissioners of Northumberland County *against* Chapman.

APPEAL.

The office of President Judge of a judicial district, is liable to taxation for county rates and levies under the act of the 11th of April, 1799.

AN amicable action on the case was entered in the Court of Common Pleas of *Northumberland* county, in which the following case was stated:—

“It is hereby submitted to the associates judges, now holding a Court of Common Pleas, to decide whether the defendant is liable to be taxed for his office of President Judge of the Eighth Judicial District of Pennsylvania, by the laws for raising county rates and levies; and if so, judgment to be entered for the plaintiffs for three dollars, the amount assessed for the year 1825. If not, then judgment to be entered for the defendant. Either party to have the right of removal by writ of error.”

The associate judges gave judgment as follows:—

“May 2d, 1828.—We the associate judges of the Court of Common Pleas of *Northumberland* county, upon the above statement are of opinion, that no state officer is liable to be taxed for his office by the county commissioners: and a President Judge, whose salary cannot by the constitution be diminished during his continuance in office, cannot be taxed. If the legislature had the power to pass an act of that kind, the constitution would be a nullity. We therefore give judgment for the defendant.”

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On this judgment a writ of error was taken out.

Donnell was counsel for the plaintiffs in error. The cause was submitted to this court on written arguments on each side.

**Arguments for the plaintiffs in error.*—The 4th section [*74] of the act of the 11th of April, 1799, (Purd. Dig. 136,) respecting county rates and levies, is very explicit in its enumeration of the objects and subjects of taxation; and, among the rest, it expressly includes “all offices and posts of profit.” Offices and posts of profit are, unquestionably, subjects of taxation.

That the situation which the defendant occupies, as president judge of the eighth judicial district of Pennsylvania, is an office, is clearly manifested by the very section of the constitution under which he claims his exemption from taxation. The second section of the fifth article of the constitution provides, that the judges of the “several Courts of Common Pleas shall hold their offices during good behaviour;” that the compensation for their services “shall not be diminished during their continuance in office,” nor shall they hold “any other office of profit” during their continuance therein.

But it is said that the constitution expressly prohibits any diminution of the compensation of a judge, during his continuance in office; and that the imposition of a tax upon this office diminishes the compensation, and is, therefore, illegal and not payable. Such a construction of the constitution would give more force to that section of the instrument than would seem, from its letter and spirit, to be warrantable. The tax does not diminish the compensation. The demand of the judge upon the commonwealth for his services is not in the least degree abated. The “adequate compensation which has been fixed by law,” remains untouched by the tax; and the undiminished amount thereof is, at stated periods, payable to his orders. The protection afforded by the second section of the fifth article of the constitution was intended to shield the incumbent from legislative interference, and to prevent the commonwealth from reducing the consideration upon which the officer accepted the service. The compensation was fixed at the time of his appointment, and no act of the legislature, under the present constitution, can withdraw any part of it from him. The burdens of the public must be sustained by the public generally; and the defendant is liable to contribute to the ordinary expenditures of government as any other citizen, unless he is exonerated by law. The law of the 11th of April, 1799, exempts the profession of a minister of the gospel and the occupation of a schoolmaster from taxation,

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but every other description of office, post of profit, trade and occupation, is expressly made the subject of taxation.

Arguments for the defendant in error.—The act of assembly of the 11th of April, 1799, for raising county rates and levies, empowers the commissioners of the county to assess a tax on all offices and posts of profit. This is expressed in general terms, but admits of many exceptions. The same act requires an assessment of taxes upon all lands held by patent warrant, location, or improvement, yet that admits of exceptions; namely, [*75] of lands granted *to soldiers, which are exempt from taxation. By the terms of the act of assembly, unimproved land, not occupied, but held by the state, cannot be taxed: neither can improved land, purchased by the state from individuals holding by patent, be taxed. The commissioners of the county of Dauphin have no right to tax the state for the state house and other public buildings for the use of the state; nor for the land upon which they are erected; the authority of the state being paramount to the authority of the county; nor can the property of a county be taxed for city or borough purposes; the rights of the county being superior to a corporation within the county. 4 Serg. & Rawle, 354. In the different counties in the state, there are many United States officers—members of congress, judges, marshals, and postmasters; have the county commissioners, for the counties in which they reside, a right, under the aforesaid act, to tax them for their respective offices; and, in that way, by the authority of a state law reduce the compensation, which, by act of congress, is allowed them? It would seem not; this would be interfering with the national government, and violating the act of congress which is paramount to the act of assembly, by reducing the compensation allowed by act of congress to their public servants. Can any state officer be taxed whose compensation for his services is derived solely from the state by act of assembly? Can the commissioners of Dauphin county lay a tax upon the governor and other state officers residing there, for their respective offices? What has the county of Dauphin to do with the heads of department, more than every other county in the state? It derives a benefit by their spending their salaries there, but they receive no compensation from the citizens of Dauphin county more than in common with the other citizens of the state. If the county of Dauphin had this right, every other county of the state would have the same right, for their jurisdiction extends over the state, and it is not the domicile which gives the right of taxation as to real or personal property; for a man is taxable for his real or personal property in every county of the state which comes within the description of the act of the 11th of April,

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1799. Militia officers, who reside in every county, never have been taxed for their offices, and yet many of them receive a compensation fixed by law; and even a county commissioner, whose daily compensation is fixed by law, has never yet been known to be taxed. The compensation allowed our canal commissioners, engineers, &c., has not yet been taxed in the counties in which they live, for their offices. Such a construction of the act would cause one act of assembly to interfere with another. The legislature allow such officers a certain and specific compensation; but the commissioners of the county will reduce that compensation by assessing upon it a tax of ten dollars per annum, which will authorize the supervisors and overseers of the poor to do the same. No state officer, whose specific compensation for his services to the state is fixed by law, can be taxed under [*76] the act, without introducing the absurdity of making this act of the 11th of April, 1799, paramount to all other acts of assembly, which would not be a legal construction of the act: such a construction can be given without any interference between the different acts of assembly. The office of president judge is, however, doubly guarded from taxation by the constitution, and by law; it is a state office, the jurisdiction extending in many instances over the whole state. The president judges have authority to issue attachments, *testatum* executions, *capias* in criminal cases, to any part of the state; their compensation is specific and fixed by law for their services to the state, with which no county commissioners in the state can legally interfere. By act of the 13th of April, 1791, the compensation allowed a president judge is five hundred pounds per annum; by act of the 4th of April, 1792, the salaries of the president judges are raised to sixteen hundred dollars; and by act of the 14th of March, 1814, mileage of fifteen cents per mile is allowed in addition to their former salaries. By the constitution of Pennsylvania, article 5th, section second, the presidents of the several Courts of Common Pleas, shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit under this commonwealth. By section seventh, article eighth, all officers, executive and judicial, shall be bound by oath or affirmation to support the constitution of this commonwealth. The constitution of Pennsylvania is the supreme law of Pennsylvania, to which all inferior laws must submit. It is a solemn article of agreement, or league and covenant, between the people and their public servants, commanding their representatives how far they may go; and so jealous were the good citizens of this common-

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wealth upon the adoption of the constitution, of their rights and liberties, that they would not trust their representatives to rule over them, until they, before entering upon the duties of their offices, took a solemn oath, or affirmation, that they would support the constitution of this commonwealth. If the legislature, in their act of the 11th of April, 1799, had expressly included president judges, it would have been a direct and positive violation of the constitution, which could not have been sanctioned by any equivocation or sophistry. If they had a right to tax the salary of a president judge ten dollars, they had an equal right to tax him one thousand dollars: but it has not been the practice of our courts to make constructive violations of the constitution, where the act of assembly did not require such a construction. It would be absurd to say that the act of the 11th of March, 1799, was an unconstitutional law, unless it expressly included offices which are not taxable by the constitution. The charitable and legal construction is, that those offices are not included under the general terms of the law. It may be [*77] asked, what offices are included *within the general terms of this act? This is not a difficult question to answer; it includes such offices as are held within the county, the incumbents of which derive their compensation by fees from the citizens of the county, and are profitable according to the business they perform, such as registers and recorders, prothonotaries, attorneys at law, &c., &c.

The opinion of the court was delivered by

GIBSON, C. J.—The ground assumed in the ingenious argument of the defendant, is that a construction which would bring the office of a president judge within the purview of the act of the 11th of April, 1799, would, at the same time, bring that act into collision with a prohibition of the constitution, which declares that the compensation of the judges of the Supreme Court, and of the presidents of the Courts of Common Pleas, “shall not be diminished during their continuance in office.” Taxes are assessed for county purposes under the authority of the legislature, which is undoubtedly incompetent to reduce the defendant’s salary. But as the constitution, like every other instrument, is to have a reasonable interpretation, the prohibition in question is to be restrained to laws which have such a reduction for their object and not for their consequence. On any other principle of construction a tax could not be constitutionally assessed on property purchased with money drawn from a judge’s salary, which would, in reason, have as fair a claim to exemption as the salary itself. If we once get away from the plain inartificial import of the prohibition, it is not easy to fore-

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tell at what stage of refinement we shall stop. The object of the legislature was to apportion the public burden according to the ratio of property, and to produce in detail a result approaching as near as possible to that of an income tax—a measure of assessment more equable in the abstract than any other that could be proposed. Now, there is no reason to exempt a judge from contribution, which is not just as applicable to any other officer who presents no tangible surface but his office, to the revenue laws; nor was the object of the prohibition to place him in this respect on higher ground. The legislature could not constitutionally retrench a part of a judge's salary under the pretext of assessing a tax on it; but, for the *bona fide* purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies. An additional objection is, that as the functions of the office are to be performed in several counties, each would have an equal claim to tax its emoluments. But the salary, which is in fact the thing taxed, is enjoyed in the county where the judge resides. That lands are taxable in the county where they are situate, is one of the accidents of territorial jurisdiction: but the right to tax an office which attends the person like a chattel, is necessarily regulated by the domicile. It may not be so easy to determine whether the power of the assessor extends to all offices, public or private, state or federal, permanent *or [*78] temporary, legislative or executive, ministerial or judicial. For instance, whether a brigade inspector of militia, or a member of the general assembly be rateable under the existing laws in respect of the office, is a question about which sensible men might differ. There can, however, be no question as to the office of a judge, which, producing a fixed income, is incontestably within, not only the letter, but the reason of the law. We are of opinion, therefore, that according to a sound construction of the act of assembly, the defendant's office was properly assessed.

Judgment of the court below reversed, and judgment rendered for the plaintiffs.

Cited by Counsel, 7 W. 513; 5 W. & S. 276; 7 W. & S. 329.

[SUNBURY, JULY 3, 1829.]

Barnhart *against* Painter and Another.

IN ERROR.

A plaintiff, in possession of the defendant's property, under a *liberari facias*, which has been set aside, and restitution awarded, though not actually made, cannot give an authority to another person, to collect from his tenant the balance of the rent due upon the lease.

If the person under such alleged authority, distrain upon the tenant, and upon replevin brought, avow for rent in arrear, under the lease, he cannot justify the distress, by proving a parol lease, by himself to the tenant.

Nor can he justify the distress, by asserting the character of administrator of the defendant in the *liberari facias*.

The proviso in the arbitration act, relative to appeals by executors and administrators, does not apply to cases in which they are sued for their own acts, even if they be done for the benefit of the estate; but to those alone in which they sue, or are sued, in their representative capacity.

ERROR to the Court of Common Pleas of *Northumberland* county.

George Barnhart brought an action of replevin, against John Painter, and John C. Caul, and on the trial, the case appeared to be as follows: On the 23d of July, 1819, Alexander Graham obtained a judgment against Lott Corson, on which a *fieri facias* was issued, returnable to January Term, 1820, which was levied on a tavern, and lot of ground, which were found sufficient to pay the debt and costs in seven years. A *liberari facias* was issued to November Term, 1824, and Alexander Graham was put into possession. In January, 1825, he leased the premises to George Barnhart, for one year, from the 1st of April, 1825, at the yearly rent of fifty dollars, payable quarterly.

On the 30th of April, 1825, the *liberari facias* was set aside by the court, and restitution awarded, but not actually made. Graham had received twenty-five dollars, two quarters' rent; and afterwards, by an indorsement on the lease, authorized John Painter to collect, and receive the balance. Painter distrained upon Barnhart's property, for two quarters' rent. It appeared, [*79] that *Mary Barnhart, by her next friend, George Barnhart, had brought a suit against Lott Corson, to January Term, 1824, and had obtained judgment against him; and, on the 12th of January, 1826, George Barnhart was put into possession, on a *liberari facias* issued on that judgment. Lott Corson had died on the 2d of October, 1824. Mary Barnhart's execution was never set aside.

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The replevin was brought to August Term, 1826. On the 2d of June, 1826, the defendants entered a rule of reference; and the arbitrators, on the 29th of July, returned an award in favour of the plaintiff for seven dollars damages, with costs. On the 17th of August, a paper was filed, signed by the defendants' attorney, stating, that the distress and rent were for the use of John Painter, administrator of Lott Corson, and that Painter would appeal, without paying costs, and, on the same day, he made affidavit and appealed. On the 22d day of August a rule was granted, to show cause why the appeal should not be dismissed, which was afterwards made absolute; but, on the 17th of April, 1827, the rule was rescinded; and, on the same day, Painter avowed, and Caul made cognizance for rent in arrear on Graham's lease, assigned, as they averred, by Graham to Painter, and claimed rent from the 1st of October, 1825, to the 1st of October, 1826. On the avowry was indorsed as follows:—John Painter suggests, that the rent is, and was claimed for the use of the creditors of Lott Corson, deceased, of whom he is administrator *de bonis non*, &c. The plaintiff replied, no rent in arrear, *non demisit*, &c.

On the 1st of December, 1827, a verdict was found for the defendants, with twenty-five cents damages, and the amount of the rent was found to be twenty-five dollars, and judgment was rendered accordingly.

The charge of the court having been excepted to by the plaintiff's counsel, a writ of error was taken out, on the return of which, the following errors were specially assigned:—

"1. The court erred in reinstating the appeal from the report of arbitrators, after the same had been stricken off.

"2. The court erred in telling the jury, that the only question which remains is, 'whether John Painter, as administrator of Lott Corson, could recover this rent for the payment of the debts of Corson. If the jury believed there was not personal estate sufficient for the payment of Corson's debts, lands and tenements, as well as goods and chattels, are considered assets for the payment of debts. In that case, the administrator would have a right to collect the rents due the deceased, and appropriate them to the payment of the debts. The general principle is, that administrators cannot meddle with the proceeds of real estate, but the case is altered when there is not sufficient real and personal estate for the payment of the debts. How it was in this case, the jury can determine from the evidence.'"

Greenough, for the plaintiff in error, insisted, that the appeal,

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[*80] *which was at first properly struck off, ought not to have been reinstated. But, without resting upon the error of thus replacing it, as it was argued in the court below, that the first decision had been given without hearing the opposite party, he contended, that the appeal should never have been admitted. The distress was made by Painter in the character of assignee of the lessor, and the rule of arbitration is taken out by him in that capacity. When the proceedings return to the court, he drops the character of assignee, and assumes that of administrator; contending, that as such, he may appeal, without paying costs. The allowance of the appeal was erroneous.

The charge of the court was erroneous in the instances pointed out in the assignment of errors. Whether an estate is indebted or not, the administrator is not entitled to receive the rents accruing after the death of the intestate. This principle is too clear to require the support of authorities.

Bellas, contra, answered, that it appeared from the evidence, that after the death of Corson, Barnhart, when called on by Painter, agreed to pay to him the rent, and this must be considered as a new demise. The general principle will not apply if a new lease is thus created; and the administrator, when he receives the rent upon it, will be bound to account to the creditors, and, therefore, may justify the distress by virtue of it. If the pleadings were disregarded on the trial, and evidence given of a parol lease, we ought not now to go back to the pleadings, and try the cause on them. If objections had been made on the trial, we would have amended the pleadings.

But *Greenough*, as to the agreement, asserted to have been made by Barnhart, referred to the evidence to show, that Barnhart was, at that time, ignorant that the *liberari facias* had been set aside, and as soon as he was acquainted with the true state of the facts, he refused to pay either Graham or Painter.

SMITH, J., (after stating the principal facts, the pleadings, and the charge of the court below,) delivered the opinion of the court as follows:—The instruction given to the jury was erroneous. On the issue of no rent in arrear, the question to be tried was, whether Alexander Graham had a right to demand rent? To me it appears very evident, he had no such right. His claim was founded solely upon his writ of *liberari facias* to November Term, 1824. If this execution had not been issued, Alexander Graham would not have had possession; and when, therefore, it was set aside, and restitution awarded, he not only lost all claim

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to the rent, subsequently accruing, but could have been compelled to restore to Lott Corson, if he had been living, or to his heirs, if he were dead, the rent he had received. His right was then founded on the execution, and, therefore, when that was gone, his claim to rent was gone also. This, too, seems to have been taken for granted, by the judge who tried the cause, for in his charge, he says, "Under that lease John *Painter was not entitled to receive rent." But this was the very [*81] question then trying, for it was under this lease, that Painter set up his claim to the rent; it is set out by him in his avowry at large, and it is on this lease, the plaintiff replied, there was no rent in arrear. I am then decidedly of opinion, no rent was due to Alexander Graham, when he authorized John Painter, by the indorsement on the lease, "to receive and collect the balance of the said lease;" and, therefore, Painter could have no right to demand any under the said lease.

It is, however, alleged by the defendant's counsel, that, although no rent was due under this lease to Alexander Graham, yet, there was a parol lease from John Painter to George Barnhart, and that by virtue of this, he had a right to distrain. There is something plausible in this. But it is unfortunate for the defendants that John Painter should set out in his avowry, and in his warrant, a lease so entirely different from the one under which he claimed the rent. If such a lease really existed, of which, I confess, I am at a loss to discover the evidence, it cannot help the defendants. The issue was taken upon Graham's lease; which was a written lease, not a parol one. But if the defendants had even proved, that another lease between other parties did exist, and that the rent was due upon that other lease, and not on the lease mentioned in the avowry, the plaintiff's case would have been made out, and the defendants acknowledged to be trespassers. They can be justified only by the lease set out by themselves, or not at all.

It is further urged on the part of the defendants, that John Painter being the administrator of Lott Corson, deceased, was clearly entitled to the rent, and as administrator could distrain. This ground, I deem equally untenable. John Painter does not claim by virtue of a lease from Lott Corson, nor upon his own lease. It must be recollected, that when Graham's execution was set aside, and thereupon restitution awarded, if Corson had been living, he could have claimed restitution, and he being dead, his heirs, not his administrator, have the same right. It is unnecessary, in this case, to determine, whether an administrator can enter upon real estate, and take the profits; it is certain, he cannot bring an ejectment for the real estate of the intestate, nor enter upon and disturb the heir, without an order

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of sale from the Orphans' Court. See also *Drinkwater v. Drinkwater*, Administrator of Prince, 4 Mass. Rep. 356, where this matter is fully elucidated. Once for all, Painter had not entered upon the property and given a lease; nor does he justify, under a lease from Lott Corson, or himself. And I, therefore, think, the charge of the court was erroneous, in leaving it to the jury to find for the defendants, on a supposed right in John Painter, as administrator of Lott Corson, deceased, to distrain for the rent in question.

Another error is assigned on this record. It is this, that "the court erred in reinstating the appeal from the report of [*82] arbitrators, *after the same had been stricken off;" in other words, that the whole proceedings, since the award of arbitrators, are illegal. I have already stated, that this was an action of replevin, in which the plaintiff complained of the illegal acts of the defendants. He does not claim anything from Lott Corson, or his estate; but, demands damages from John Painter and John C. Caul, for unjustly taking and detaining his property. Clearly, trover or trespass would lie. It is evident, the personal acts of the defendants, constitute the grounds of this action; and in case of recovery, damages are recovered for the detention. The proviso in the arbitration act, allowing executors or administrators to appeal, as theretofore, cannot, and in my opinion, does not apply to cases in which executors or administrators are sued for their own acts; but merely applies where they sue, or are sued in their representative capacity. To construe it otherwise, would be a perversion of the act, or the provision in it. In this action, there was an award of arbitrators for the plaintiff, on the 29th of July, 1826, against the defendants. The defendant, Caul, does not appeal. John Painter alleges, that he is administrator of Lott Corson, deceased, and, therefore, he can appeal without payment of costs, in an action, in which the estate of Lott Corson is not sued, and in which damages are demanded of him for his own personal wrong or misfeasance. To illustrate this, let me suppose Painter had entered a man's stable, and taken his horse, and an action of trespass or replevin, brought against him;—can he, by alleging, that he committed the trespass with a view to benefit some estate, of which he was administrator, claim privileges, which are not allowed to those who commit a trespass for their own benefit? Suppose an action of trespass had been brought against Caul alone, could he claim an exemption from costs, because the administrator of Corson had employed him, and intended to defend him? It cannot be. The appeal then, by Painter, without payment of costs, was illegal. The plaintiff objected immediately, and if the court had rejected his motion,

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he could have taken advantage of it in this court. It is, therefore, clear on this ground, that the reinstating the appeal, (not indeed at the next term, but at the third term, after it had been stricken off,) and all subsequent proceedings were illegal, and must be reversed. It is not necessary to raise the question, whether the court here have a right to reinstate an appeal, after it is struck off; or, whether it must be reinstated by the court of error. The plaintiff's ground is, that the appeal was illegal, and was rightly struck off, and the error was, in the court below reinstating it. Besides, the defendant did not avow as administrator of Lott Corson, but as assignee of Alexander Graham. He could, therefore, not appeal, as Lott Corson's administrator, nor without payment of costs. The judgment is, therefore, to be reversed.

Judgment reversed.

END OF JUNE TERM, 1829.—MIDDLE DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

WESTERN DISTRICT—SEPTEMBER TERM, 1828.

The following cases, embracing a few of the decisions at Pittsburg, September Term, 1828, and the whole of those at Chambersburg, in September Term, of the same year, were prepared for the press by Mr. Sergeant, who intended to publish them in the closing volume of Sergeant & Rawle's Reports. They were found, however, too numerous to be introduced into the Seventeenth Volume, and too few to form a separate one; a place is, therefore, given to them in the present volume.

[PITTSBURG, SEPTEMBER 9, 1829.]

Alexander and Another *against* Kerr.

IN ERROR.

An action on the case will lie for injury to land, however inconsiderable, which is occasioned by a nuisance.

A. erected a mill and dam upon his own land, lying on Christine's creek. B., who then owned a tract of land lying higher up on the same creek, told A., at the time of the erection, that he would sue A., should the dam injure his own land. B. afterwards lived on his tract four years, and never complained of any injury from the dam; but B. and C., to whom the tract was subsequently conveyed by B., said, that they considered the dam a benefit. After the death of A., the mill was sold by his executors at public sale, and was purchased by the defendants. D., then owner of the aforesaid tract, by a prior conveyance from C., was present at the sale, but said nothing respecting the dam's being an injury to his land. D. afterwards conveyed to the plaintiff; who, at a subsequent period, but within twenty years from the erection of the mill, brought suit for injuries occasioned by the dam to his land: Held, that the preceding facts were no bar to his recovery.

ERROR to the Court of Common Pleas of *Allegheny* county.

W. Kerr, the defendant in action, brought an action on the case against Alexander and M'Kown, the plaintiffs in error, to

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recover damages for injury done to his land, by the overflowing of water, alleged to be occasioned by a mill-dam belonging to the plaintiffs in *error. The land thus overflowed, [*84] of which a part is bottom land, lies on Christine's creek, and was bought by D. Herbert, in 1786, who resided thereon till 1813, when he conveyed it to W. Gilmore. In August, 1820, E. Kerr purchased this land from Gilmore; and in January, 1824, E. Kerr conveyed the same to W. Kerr. The mill and dam were erected in 1809, or 1810, by T. Algeo, upon land owned by him, and lying on the same creek, but at the distance of about one hundred and twenty perches below the land of W. Kerr. After the death of Algeo, his executors sold the mill, and thirteen acres of land, at public sale, for eight thousand eight hundred and fifty dollars, when it was purchased by Alexander and M'Kown.

On the trial in the court below, it appeared in evidence, that Herbert, then owner of the land now belonging to W. Kerr, had told Algeo, about the time of the erection of the mill-dam, that, if the dam should swell the water, so as to injure the land, he would bring suit against Algeo. Herbert lived on the land several years after this period, and never brought suit; neither did it appear that he, or any of the subsequent owners of the land, had ever complained of any injury, as resulting from the erection of the mill-dam; but it was testified, that Herbert had said, while owner, that the dam did no injury to his land; for, although it swelled the water higher, when there was a flood in the creek, yet it lessened the rapidity of the current, and his banks were less injured. It appeared, that Gilmore also had said, while owner, that he considered the dam a benefit.

At the sale of Algeo's land by his executors, E. Kerr, then owner of the land now belonging to W. Kerr, was present, and gave no notice that the dam did any injury to his land, but was altogether silent respecting it.

It was proved, by many witnesses, that occasional floods, and especially within the last ten years, had repeatedly overflowed the bottom land of the tract owned by W. Kerr, forming one or more ponds thereon, carrying off the soil in various places, and covering portions of it with sand and driftwood. Whether, and how far, the mill-dam was the cause of this injury, by occasioning a backwater, which overflowed the land, was the subject of contradictory testimony.

The defendants below produced witnesses to prove, that the land in question had been overflowed during seasons of high water in the creek, before the erection of the mill; that a breast-work had been built by Herbert on this land, long before the dam was erected, to prevent the water from running through

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the bottom land, which had been carried away by floods before the dam was built; that the creek overflows, and injures the bottom lands of other farms, which are at a distance from any mill-dam; that several other tracts had been much more injured than this; that the thirteen acres which they had bought at public sale, would, without the mill, be of very little value; and [*85] that they had paid near two-thirds *of the purchase-money for the said mill, and thirteen acres, before the commencement of this suit.

The counsel for the defendants below, requested the charge of the court on various points, of which it is necessary to give only the third and fourth.

"3. Herbert, under whom the plaintiff derives title, said the dam was rather a benefit than an injury, and he never complained. Gilmore made the same declarations. After E. Kerr had purchased, he lived on the land, and never complained of any injury from the dam. He sold to the plaintiff, who lived in the neighbourhood, and had an opportunity of knowing the situation of the bottom land, before he purchased. E. Kerr attended the public sale, and made no objection to the dam, nor gave any warning to bidders not to bid. The defendants are innocent purchasers, for eight thousand eight hundred and fifty dollars; and the property, without the mill, is not worth three hundred dollars. They had paid two thousand dollars in cash, of the purchase-money, before the suit was brought. If these facts are believed by the jury, they amount in law to an acquiescence in the erection of the dam, and an abandonment of all claim for damages by those under whom the plaintiff claims, especially by E. Kerr, and the plaintiff himself is not entitled to a verdict.

"4. If the facts above stated are not conclusive evidence of an acquiescence, in the erection and continuance of the dam, and an abandonment of all claims to damages arising therefrom, they are strong evidence of them; and after so great a lapse of time, during which the land of the plaintiff has passed through three different hands, and the defendants have bought from Algeo, who bought the mill, this action is not to be favoured."

The President charged the jury as follows:

"If the credit of the witnesses, who have been examined, and between whom there is so much discrepancy, should be unimpeachable, you ought to give your credence to those whose judgment has appeared the least erroneous, and whose opinions appear to be founded on the soundest principles of philosophy, and the natural consequences that must be the result of the circumstances that have been testified to. You will then inquire, what would

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be the probable consequences, created by the erection of a dam immediately below the plaintiff's possessions on the creek. Would the effect be, to prevent the passage of ice in the spring, and throw that and drift-wood on the meadow and corn-field of the plaintiff? Would it be, to throw the surplus waters created by ordinary floods on the lands of the plaintiff, and do injury to the crops? Would it be, to convert the most profitable portion of his bottom lands into a sand-bank, or a gravel-bank? Or, would the effect of it be, as is contended by the defendants, to cause a deposit that would enrich the soil, and give additional value to the plaintiff's property? You will recall the testimony, and make such inferences from the facts in *evidence, as [*86] will sustain those opinions of the witnesses which to you may seem most consistent with the effects usually produced by the erection of a mill-dam.

"The defendants would be liable for damages, in cases of extraordinary, as well as ordinary floods, if the jury are satisfied that such damages were the effect of the dam.

"It is a maxim in law, that a man must so use his own property, as not to injure the property of his neighbour. If a citizen is bound to submit to a small inconvenience, he is by the same rule bound to submit to a great one. If I have a right to flood my neighbour's field, by raising the water on it one inch, I have the same right to raise it twelve inches over his meadow. What, then, shall hinder me from raising it to such an elevation as shall prove utter ruin? I have, therefore, no hesitation in saying, that, if the erection of Algeo's dam has caused injury to the plaintiff's field, upon common law principles, the plaintiff would be entitled to recover."

Answer to the defendants' third point.—"Whether the defendant is an innocent purchaser, without notice, is one of the facts in controversy. It cannot be assumed; nor can any man be considered in that light, in relation to a party, who, at the time was in possession of his own property, with an undisputed boundary, and under an unquestionable title.

"Supposing the facts, with the exception of that already observed upon, to have existed as stated in the third point made by the defendants' counsel; if the defendants did not purchase under the ownership of Herbert or Gilmore; if there is no reason to presume, that Herbert's declarations, or Gilmore's opinions, as to the beneficial effect of the dam, were made known to the defendants at the time of, or before their purchase, or that they operated upon them so far as to be inducements towards becoming purchasers; the circumstances, that E. Kerr resided on the land, and made no objection to the raising of the dam; that the plaintiff lived near the land before the purchase; and that E.

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Kerr attended the sale without notifying the purchasers of the existence of the nuisance, combined even with the length of time that elapsed, do not furnish conclusive evidence of an abandonment of right, or an acquiescence in the nuisance by the present plaintiff; nor can they be construed by equity into that description of fraud that will bar the plaintiff's recovery.

"It is true, it is said, by certain elementary writers, to be a fraud in any man, to stand by whilst property is selling, to which he may have title, and not give notice thereof to purchasers. This standing by is deemed in equity, to be an encouragement to innocent men to lay out their money for mere moonshine; and he who has a title, and permits purchasers so to lay out their money, without warning, shall be considered as acting fraudulently, and shall be considered as a trustee for the person so deceived. For this principle no case can be found, but taking [*87] it to be the law, it is not applicable to this *case. Ebenezer Kerr, although present at the sale, concealed nothing. The elevation of the dam, the effects of floods, the injuries supposed to be done, were facts which were within the power of any purchasers to know, and the jury are bound to infer, that every prudent purchaser made the necessary inquiries. There could be no concealment where facts were notorious to the neighbourhood; there could be no pocketing of titles, no secreting of rights, when the annual floods of the neighbouring country stood ready to announce all that purchasers should have inquired about. Besides, Kerr was in possession of the land, and had the title in him—its extent was notorious. The purchasers of the mill were bound to inquire in relation to the boundaries. If they did so, they either discovered, that the water overflowed the land, or that it did not. In the former case, they consented to run the risk; in the latter, they had no risk to run. If they made no inquiry, upon themselves must rest the loss."

Answer to the fourth point.—"I do not think the facts, as stated, ought to be regarded as strong evidence of acquiescence in the erection and continuance of the dam, and as an abandonment of all claims to damages arising therefrom. On the contrary, I think they furnish but a bare evidence of the abandonment and acquiescence contended for; although you may, if you think proper, presume it from them. And I must confess, I can see no reason why, if you believe the dam is a nuisance, and that the plaintiff has sustained an injury, his suit should not be as highly favoured as that of any other claimant in a court of justice."

The jury found a verdict for the plaintiff below.

The following errors were assigned:—

"1. The court erred in stating to the jury, that the defendants

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below were answerable for damages occasioned by extraordinary floods, if they were the effect of the dam.

"2. In their answers to the defendant's third and fourth points.

"3. In stating in substance, that injuries, however slight, occasioned by the erection and use of a mill-dam, were the subject of an action for damages."

Burke and Forward, for the plaintiffs in error.

1. A slight inconvenience, arising from the reasonable use of a man's own property, furnishes no ground of action. Com. Dig. Action on the case, C.; 3 Caines, 307; 15 Johns. Rep. 213; 8 Mass. Rep. 136.

2. As to the third and fourth points of the defendants below. The fact of acquiescence for fifteen years, is sufficient to bar this action. Rob. Fraud. Conv. 529, 530. Standing by, and remaining silent at the public sale, is sufficient to postpone any right of W. Kerr to compensation, to the interest of a purchaser without notice. 1 Serg. & Rawle, 111. Lying by, while improvements are made, has had that effect. 2 P. Wms. 82, 83; 2 Eq. Ca. Ab. 488; 9 Mod. 2, 3; 1 Hen. & Munf. 429; 2 Caines, 382; 2 Johns. Rep. 573; 5 *Ves. 689, MS. Note; [*88] Rob. on Stat. Frauds, 129, 132; 3 Atk. 692; 2 Atk. 82; 3 Serg. & Rawle, 203; 10 Serg. & Rawle, 43; 13 Serg. & Rawle, 304; 1 Fonb. 163; 8 Serg. & Rawle, 92; 2 Munf. 468; 5 Munf. 334.

Fetterman and Baldwin, for the defendant in error, were directed to confine themselves to the second point made in this court.

A license, merely gratuitous, may be revoked at any time. 10 Johns. Rep. 246; 3 Dane's Ab. 252; 11 Mass. 503. Lying by is no stronger than such a license, and a change in the ownership of the land, is equivalent to a revocation of such license. 11 Mass. Rep. 503; 6 Johns. Rep. 136. The defendants below had, in fact, notice from the very nature of the nuisance. Sugd. Vend. and Purch. 478; 9 Mod. 96; 1 Vern. 136; 2 Vern. 150, 239, 370.

The opinion of the court was delivered by

GIBSON, C. J.—It is supposed, that an inconsiderable injury from a nuisance, is an insufficient cause of action. Admitting the propriety of the judgment in the particular cases that have been cited in support of the position, I am unable to concur in the reasons of the judges, who seem to have thought, that the right to recover at all, depends rather on the extent than the

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nature of the injury. The true distinction seems to be, between cases where the injury is remote and common to many, without particular damage to any one, and those where it is proximate in its effect, and confined to particular persons. For injuries of the first class, it is proved by the authorities collected in Com. Dig. Action B, 2, that an action does not lie. And of this class are the cases cited from the New York and Massachusetts Reports, as well as the case of *Shrunk v. The Schuylkill Navigation Company*, 14 Serg. & Rawle, 74, which was an action for obstructing the passage of fish, by which the plaintiff's fishery was destroyed. And there is sound reason for the distinction. All persons have a natural right to the use of water flowing over their land. But if each were answerable to all the rest for consequences that are in a greater or less degree inseparable from every exercise of the right, the benefit of the stream would be lost to all; for no one could use it without producing a diminution of its quantity by consumption, or evaporation, or an irregularity in the flow of it by retention. The law, therefore, requires each to bear with the consequences of a reasonable use of it by his neighbour. But these consequences, instead of being slightly injurious, may be destructive of valuable natural advantages. The consumption of but a small portion of the stream, might, by rendering the residue insufficient for the purposes of a mill, destroy a valuable site; and, the retention of the water for but short intervals, would render the stream useless to a furnace, the operations of which, cannot be intermitted. But this would not give a claim to the value of the site in damages. So, an action will not lie for the destruction of a fishery from an [*89] erection which prevents the passage of the fish. *In these cases the injury is remote, the party having no property in the water used, or retained, nor in the fish before they are caught; and it is general in its consequences to all occupants of the stream, similarly situated. But to flood the land of an adjoining occupant, is not necessary to the enjoyment of any natural right. The injury produced by it, is out of the common course, and done to an individual; and whether it be great, or whether it be small, is a consideration that can affect only the *quantum* of the damages.

In the application of the principles connected with the remaining point, there may, perhaps, be greater difficulty.

Before the dam was erected, the *terre-tenant* of the land now owned by the plaintiff, objected to its being erected, as being likely to prove injurious to him. From that time to the inception of this action, neither he nor his successors, testified any dissatisfaction, usually grinding their corn at the mill, and some of them declaring, that the dam did the place no injury; and

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one of them being present when the mill was purchased by the defendants, omitted to give notice of the existence of the injury for which damages are sought, and to declare his determination to insist on having it removed.

The equity attempted to be deduced from these circumstances, depends on distinct considerations. Against the original author of a nuisance, no forbearance to sue, short of the period which, in analogy to the statute of limitations, has been assumed as conclusive in the case of an adverse occupancy of a water right, can be set up as a bar; and as the dam was erected in 1810, it is impossible that there can have been a forbearance for twenty years. Nor can this period be abridged by the interference of a purchaser, who has no reason to infer, from a forbearance for a considerable time, a determination to forbear for ever. Such a purchaser, voluntarily, and with full knowledge, takes the place of a wrongdoer, and stands in no higher equity. He, therefore, has no right to be informed, that the suffering party has not abandoned his rights. But a positive act, calculated to induce him to purchase, would place him on higher ground; and were it shown, that he purchased here on the faith of declarations by the plaintiff's predecessors, that the dam was not injurious to them, I should hold the merits of the cause to be with him. But that circumstance was not an ingredient in the case submitted to the court, nor is anything of the sort to be found in the evidence. The defence, then, rests exclusively on the effect of Ebenezer Kerr's silence at the sale; for if the circumstances which I have just mentioned, be insufficient to raise an equity, considered separately, they will be insufficient in conjunction with other circumstances, which separately are also insufficient.

Undoubtedly, there are cases where the mere concealment of the title of a third person, may be fatal to his right; and this principle may, according to circumstances, be applicable to the case of a nuisance, caused by an erection on the property purchased. Where the existence of the nuisance is not self-evident, it may unquestionably *be the duty of the party injured, [*90] to apprise the purchaser of the responsibility to which he is about to subject himself. But while courts of justice have, on the one hand, endeavoured to repress dishonesty, they have, on the other, exacted the utmost vigilance and caution. It is difficult to imagine, how the concealment of a fact, which an individual of common prudence and sagacity would discover, can constitute a fraud. It is a clear elementary principle, that the law imputes to the purchaser a knowledge of every fact, of which the exercise of ordinary diligence would have him put in possession. Newl. Cont. 511. And, such an imputation of knowl-

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edge is sufficient to rebut the inference of a merely constructive fraud, which might otherwise be implied from the silence of a party. Even a positive misrepresentation which, when it induces a careful man to forego an inquiry that would have resulted in full knowledge, constitutes positive fraud, even where the means of information is not exclusively within his reach, will, nevertheless, not give him an equity, if he had, in fact, a knowledge of the true state of the case, derived from other sources, because he was in truth not deceived. It is also a familiar rule, that notice is unnecessary, where the fact is equally within the knowledge of both parties; which it must be taken to be, where the sources of information are equally accessible to both, and the state of the fact is obvious to the senses. These are elementary principles, about which, I presume, there is no dispute; and what evidence is there in the case, that would induce a chancellor to enjoin the plaintiff from proceeding at law?

It does not appear, that the plaintiff's grounds were inundated while the stream was at low-water mark; and hence, it might seem, that the injury was only occasional, and that the traces of it were not permanently obvious. But the water was swelled in the channel within the plaintiff's boundary, even when the dam was not full and the grounds exhibited permanent marks of injury from high water; ponds being formed, the soil washed away in some places down to the gravel, and the fields sanded, and covered with drift wood. It is in reference to the existence of an injury such as this, that the silence of Ebenezer Kerr is supposed to constitute a fraud.

The defendants were, unquestionably, bound to inspect the subject of their purchase; without which, they would become chargeable with gross negligence, which is equivalent to actual knowledge of whatever a personal examination would have disclosed, or put within the range of detection. The slack water extending from the dam to a point within the plaintiff's boundary, and the marks of injury to the grounds, were amply sufficient to put them on their guard; and, as the direction of the court is to be considered in reference to the case appearing on the evidence, it seems to me, there was no error in charging, that the silence of Ebenezer Kerr at the sale, ought not to prejudice the plaintiff's claim to damages in this action.

[*91] *HUSTON, J.—In this, as in most cases, it is necessary to attend minutely to facts and dates, in order to understand the opinion of the court.

Daniel Herbert, in 1786, purchased a tract of land, and resided on it until 1813, when he sold it to William Gilmore. On the 26th of August, 1820, Gilmore conveyed it to Ebenezer

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Kerr. It was stated and conceded, that though the deed was made in 1820, yet, articles had been entered into, and possession delivered to Kerr several years previous. In 1824, Ebenezer Kerr sold to William Kerr, the plaintiff below. The land lay on Charteirs Creek.

T. Algeo owned some land on the same creek, below the above-mentioned tract, and erected a mill, about 1809, on it. Herbert, who then owned the plaintiff's land, told Algeo, that if the dam he was erecting should swell the water so as to injure his, (Herbert's,) place, he would bring suit against him. Herbert, however, lived there four years, and never did bring suit nor complain of injury. On the contrary, it was proved that he said the dam did no injury; for that although it swelled the water higher when a flood was in the creek, yet it lessened the rapidity of the current, and his banks were less injured. Several years after the mill was built, an additional water wheel was put in and another pair of stones. Algeo died, and his executors sold the mill and thirteen acres of land, at public vendue, for eight thousand eight hundred and fifty dollars. Ebenezer Kerr, who then owned the plaintiff's land, was at the sale, and gave no notice. All the witnesses agreed, that without the mill the thirteen acres were not worth three hundred dollars. The proof was, that the defendants had paid all but about three thousand dollars of the purchase-money, before this suit was brought. The plaintiff's counsel alleged, they had not paid so much. The deed from the executors to the defendants was not produced, but it was said to contain no warranty as to water right. The defendants have refused to pay any more money until this is settled. Much testimony was given to prove, that the plaintiff's land was overflowed at high water, before the mill was erected: That a breast work had been built thirty years ago, to keep the water from running through the bottom land, and the flood carried it away immediately: That this creek overflows and injures the bottom land on other farms where no dam was near them; and that several have been injured much more than this.

There was no proof that this tract is injured, except in time of floods; but there was proof, that it had been overflowed in part, and injured repeatedly within ten years; and that floods had, in one or more places, carried off the soil loosened by the plough.

It is not to be forgotten that the dam was not opposite the plaintiff's land, but was one hundred and eighteen perches below the plaintiff's lower line. So that in examining the breast and ends of the dam, the plaintiff's land would not be in view. No part of the premises bought, touch, or come near the plaintiff.

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[*92] It is a *consequential injury, not constant and visible at all times; but occurring only when high floods occur; and that injury not discoverable from an examination of the premises bought by the defendants.

There was much contradictory testimony, whether any injury at all had been done to the plaintiff's land. And the court told the jury, that if they could not decide from the testimony, whether there was, or was not, any damage to the plaintiff, they ought to give credence to those opinions which appear to be founded on the soundest principles of philosophy, and the natural consequences that must be the result of the circumstances that have been testified to. I will only say, this is to me new ground, and I think most dangerous. Whether a flood will carry away soil, or leave a deposit, cannot, I believe, be ascertained beforehand, by those who have viewed the ground, even while covered with water; and the testimony of one witness, who saw it after the flood, and who testified that no soil was washed away, but that the flood left a deposit on the ground, would outweigh all the reasonings of all the philosophers in the world. I do not say there is no case in which a witness may be disbelieved, because his testimony is contrary to the nature of things; but I protest against introducing speculations of philosophy, to overrule positive testimony of plain, honest men. The principal questions in this case, arose on the effect to be produced by the declarations of Herbert and Gilmore, under whom the plaintiff claimed, and the silence of E. Kerr, who was at the vendue, and gave no notice; who saw the defendants buy for eight thousand dollars; and who, as the plaintiff contends, had the right to reduce the property to be worth only three hundred, and who did not mention this right of his. The judge says, "he had his deed recorded, and they must look to that, and he was not bound to give notice." But it is obvious his deed could not give any information on the subject of the water rising, or that when it rose, it overflowed its banks. The judge says, "there is no evidence that the defendants ever heard, that Herbert and Gilmore said, it did not injure this land; but," he says, "they were bound to inquire." Now, if they did inquire, they heard what would have induced them to purchase. But after a dam had stood many years, after the plaintiff's lands had changed owners three times, and no complaint, the then owner being present, was bound, by every principle of justice, to make known this concealed claim of right of his to pull down that dam, and render the property of no value.

It ought not to be forgotten, that in newly settled parts of the country, he who builds a mill, is considered as doing a great benefit to the neighbourhood. If it is true, that he may be not

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only permitted, but encouraged to build; that all the owners of adjoining lands may expressly or tacitly agree, and yet, when the mill has become valuable, the vendee of any of those who agreed to its being built, nay, the fourth vendee, when none of prior owners had objected, may compel him who built it, or his children, after his death, *or the purchaser of what the [*93] builder and his children had enjoyed in peace, to pull down the dam, it is time this should be known. It is said, this matter has not been decided; that it is only to be found in elementary writers. This is a great oversight. I should suppose one hundred cases could be collected in a short time. I shall mention a few from the English books, and will only add, that modern cases are not contrary.

2 Atk. 83. Where a man has suffered another to go on building upon his ground, and not set up a right till afterwards, when he was all the time conusant of his right, and the person building had no notice of the other's right, chancery will oblige the owner of the ground to permit the other to enjoy quietly and without disturbance.

3 Atk. 692. Tenant for life makes a lease for sixty years; tenant rebuilds the houses at a great expense, and assigns his lease. In the twenty-ninth year tenant for life died; the tenant in possession paid the rent for six years to the remainderman; and in the meantime made additional buildings. Remainderman brought ejectment and recovered; and an injunction granted, because the remainderman stood by and saw tenant rebuild and gave no notice; and because he accepted rent while tenant was adding additional buildings and gave no notice. Here a title good at law, and a recovery at law, were postponed; and yet it might, with some colour, have been said, the tenant was bound to inquire into the title of his landlord; this, however, was not sufficient to protect the legal owner, who was estopped by his own silence.

Rice v. Potts, Precedents in Chancery, 35. A. was tenant in tail, remainder to B. in tail. A., not knowing of the remainder, made a settlement on his wife by way of jointure; this was engrossed by B., who knew of the entail, but was silent. After the death of A., B. brought ejectment, and recovered against the widow. She was relieved in chancery, and a perpetual injunction granted. 2 Vern. 150.

2 Johns. Rep. 589. Thompson, Justice, in delivering the unanimous opinion of the court, says, "Though it does not appear that B. took any agency in the negotiation, yet his presence and silence are equally efficacious and binding on him, if the complainant was thereby misled and deceived. There is an implied as well as an express assent; as, when a man who has a

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title, and knows it, stands by and either encourages or does not forbid the purchase, he and all claiming under him shall be bound." And he quotes, with approbation, the sentence in equity; "therefore, when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent." In this case, too, a legal title was postponed.

The decisions of our own courts are also strong on this subject.

Covert v. Irwin, 3 Serg. & Rawle, 289. Land was selling by the sheriff as the property of T. Proctor. Covert was in possession *of the land, claiming it as his own; but it had [*94] been somehow reported that he was in under Proctor; he was present at the sale. The opinion of this court, delivered by the late Chief Justice, was, "I think the court were right in the opinion, that if Covert did stand by, knowing that he was represented as Proctor's tenant, and not contradicting it, he could not afterwards contest the title of Proctor with the purchaser." In this case E. Kerr stood by and saw this mill selling, with the dam as it is now; if he did not make known his claim of a right to compel it to be taken down, I do not see how he can, or why he ought to be permitted to assert that right now.

Billington v. Welsh, 5 Binn. 129. Welsh had purchased and paid for fifty acres of land, part of a tract of Turner's, on which was a forge, &c., &c., had built a house on it, and was living there; he was a brother-in-law of Turner's. The whole tract was levied on as Turner's, advertised several times, and at length sold. Welsh knew well of the advertisement. The cause was tried before Judge Yeates, who told the jury that if Welsh knew of what was going on, he ought to have given notice of his claim to the sheriff, and warned all persons against purchasing; failing herein, a legal fraud would be imputed to him. On appeal this was affirmed. Chief Justice Tilghman says, "it became his duty to make known his secret title to part of the land; he gave no notice: not having done so, he acted at his peril, and has no right to complain if his title is impeached by persons who had not actual notice of it." When we consider the law of levies and sheriff's sales, that a plaintiff can take only what is the defendant's, and that a purchaser buys at his peril, that case is much stronger than this.

13 Serg. & Rawle, 167, is a late case, and the principle is fully recognised. The sheriff was selling a tract of land on the oldest judgment, but notice was given at the sale that it would be sold subject to a younger mortgage. The purchaser refused to pay the mortgage. This court held, that although it could

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not legally be sold subject to the mortgage, yet as the purchaser, who was the plaintiff at whose execution it was sold, was silent, and did not make known his opinion, that the purchaser would hold it clear of the mortgage, he could not keep the land without paying the mortgage; his silence was considered equal to his express agreement, that it should be sold subject to the mortgage; and that silence cost him his debt.

The case in 8 Serg. & Rawle, 92, is nearly in point. A dispute arose as to the right to use an alley in Philadelphia. The court were of opinion against the right of the plaintiff; it had been conveyed by one whose right would not authorize such a conveyance; but the alley was used by all those living in the court. The plaintiff bought, and though by a close examination of the deeds it could be discovered that her title to the use of the alley was not good, yet she recovered against the defendant for disturbing her in the *use of it, on the ground that [*95] when she bought she saw those who lived in the court actually using the alley. "Shall," says the Chief Justice, "the defendant be permitted to hold out false colours to the injury of innocent purchasers? Is not the case as strong against him as against a prior mortgagee who is privy to a second mortgage and conceals his own."

Let us now look at the matter on principle. Admit that Herbert might have sued and recovered damages; he would not, he did not; but he sold to Gilmore. What did he sell? His land as it then was, with the dam erected. Gilmore not only did not claim a right to pull down the dam, but he did not wish for such a right; he said it did him no harm. Clearly, he did not sell to E. Kerr, nor did E. Kerr possess the right to compel Algeo or Algeo's heirs to pull down this dam. He lived there some eight or ten years; stood by and saw it sold, for twenty times its value, if the dam were removed; he gave no notice, because he had no right, or because he was determined never to use it; and the present plaintiff is as much bound as he was.

It has, however, been argued, that if notice is given before all the purchase-money is paid, a purchaser is not protected. As to the fact, the proof is not contradicted by any proof, though it was by the statement of counsel, that above four thousand dollars had been paid, and something more than three thousand dollars remained due; and Sugden was cited to prove the position, that if notice is given before the deed is executed, though all the money is paid, or before all the money is paid, though after the deed is executed, the purchaser is not to be considered as an innocent purchaser without notice. Admitting, for the present, what I do not agree to without qualifica-

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tion, that the law is so settled, it will be found to apply to cases where the notice was given as soon as the purchase was heard of, and has no relation to cases where a man stood by and saw a contract made, possession taken, a great part of the money paid, and a deed received, without those clauses which would have been required if notice had been given. It can only apply to cases where he who gives the notice did not know of a bargain proceeding. The law is not so absurd as to permit a man to see a sale made, and nine-tenths of the money paid, possession taken and kept for years, the money paid to executors, and by them to creditors or heirs, and irreclaimable; and, after all this, consider his conduct fair, if he gives notice before the last ten dollars are paid.

But even Gilmore, if now in possession, and owner, could not, on the testimony given, support a suit against Algeo, if alive, although Herbert did tell Algeo that he would sue him if the dam injured his place; yet he afterwards said it did him no injury, and he did not sue. Gilmore purchased, and said it did him no injury; and after this, Algeo put another water-wheel and additional stones in the mill, and increased its value at great expense. It would have been a fraud in him to have [*96] required afterwards that all *this should be destroyed; and if he had recovered at law, chancery would have granted an injunction. Many of the cases cited prove this; and there is another in 2 Eq. Ca. Ab. 522, and cited and approved in Harrison's Chancery, 172. A. sees pipes laid at great expense, and makes no objection; afterwards he sues, and chancery granted an injunction. In fact, the principle is the same whether a man is permitted to improve at a great expense, or purchase at a high price; in neither of which cases can a man, who has permitted the alleged nuisance to stand many years without objection, and who sees additional money expending, without objection, be heard, when he afterwards applies to a court to render the improvements or the purchase worthless.

I see much evil and injustice in this individual case, and more in its consequences. If the owner of land can suffer a friend to erect a dam, and make no complaint for fifteen years, till that friend sells it, and then cause it to be pulled down, it is a serious matter to the community: but if the owner of land permits a dam to be built, which occasions the water to swell on his land, and sells his land, as the land then is, with the water swelled; if it is sold again, and no objection is made; if, under these circumstances, the mill has been enlarged and improved at great expense, and is sold for its full value, and, after this, the terre-tenant sells to a fourth owner, and he can overhaul all this and destroy the mill, it is, to my mind, a great

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imputation on our laws ; such has not been the understanding, nor such the decisions. I think there was error in the charge of the court.

TOD, J., concurred with HUSTON, J.

Judgment affirmed.

Cited by Counsel, 5 Wh. 105; 6 Wh. 206; 1 W. 242; 9 W. 119; 3 W. & S. 317; 4 W. & S. 22; 6 W. & S. 111; 9 W. & S. 198; 7 Barr, 335; 2 J. 325; 1 H. 342; 4 C. 290; 7 C. 333; 4 S. 367; 5 S. 423; 9 S. 218; 23 S. 167; 24 S. 437; 4 N. 415; s. c. 5 W. N. C. 42; 10 N. 43.

Cited by the Court, as to the question of estoppel, 3 W. 240; 5 W. 314; 6 W. 323; 7 W. 401; 8 W. 441; 3 W. & S. 565; 5 W. & S. 302; 4 H. 364; 2 S. 405.

In 1 Barr, 320, it is said of this case, that it was a case of private nuisance, which is a direct injury: still, the court goes on to say, "We think the rule applicable to an injury done by a common nuisance, the consequence of which is that another is hindered and delayed in his business. It would not be so in England, where a distinction, which we have repudiated, is taken between direct and consequential damage."

*[PITTSBURG, SEPTEMBER 27, 1828.]

[*97]

Huston *against* Springer.

IN ERROR.

J. H., a tenant in common with D. S. of a forge, leases his share to J. S., the son of D. S., and in the lease it is agreed "that considerable new work and repairs must be done to the forge, such as roofing, and repairing the fore-bay and trunks; and also the hammer and bellows wheels, so far as may be agreed on by D. S. and J. H.; the expense of which repairs is to be kept correctly and particularly by J. S.; and the said J. H. agrees to discount out of the rent one-half of such expense, provided it should not exceed the sum of one hundred and eighty dollars in any one year; and the said J. S. is to keep the said forge in good, tenantable repair during the said term, and at the expiration thereof, give up peaceable possession of the forge and premises, being the undivided half, to the said J. H." Held, that the lessee was not bound, in the event of D. S. not agreeing to essential repairs of the kind particularly mentioned, to make them at his own expense, under the covenant to keep the premises in tenantable repair, but was entitled to contribution for so doing.

But such contribution is a personal charge against the co-tenant, and not a lien on the profits in the hands of his successor.

WRIT of error to the Court of Common Pleas of *Fayette* county. Amicable action in account render.

The plaintiff, John Huston, declared against the defendant, Jacob Springer, in the usual form of one tenant in common against another. The defendant pleaded, fully accounted and payment, with leave to give the special matter in evidence. Replication, that the defendant has not fully accounted, *non*

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solvit and issues. The following facts were agreed upon by the parties to be considered as a special verdict :

On the first of March, 1798, Joseph Huston and Dennis Springer were seised in their demesne as of fee, as tenants in common, of fifty-one acres of land in Union township, Fayette county, adjoining lands of the said Joseph Huston and Dennis Springer. Upon this undivided property they erected a forge for making iron, a grist mill, dwelling-houses, barn, stables, coal-house, blacksmith shop, and a variety of other buildings for the accommodation of their forge and establishment.

On the 11th of April, 1822, Joseph Huston leased his undivided moiety of the said premises to Jacob Springer, the defendant, for the term of two years from that date, for the rent of three tons of merchantable bar iron, payable half yearly at the forge. In the said lease from Joseph Huston to the defendant there was contained the following provisions : "Whereas considerable new work and repairs must be done to the forge, such as roofing, and repairing the forebay and trunks ; and also the hammer and bellows wheels, so far as may be agreed on by Dennis Springer and Joseph Huston ; the expense of which repairs [*98] and new work is to be kept correctly *and particularly by Jacob Springer : and the said Joseph Huston agrees to discount out of the rent one-half of such expense, provided it should not exceed the sum of one hundred and eighty dollars in any one year : and the said Jacob Springer is to keep the said forge in good, tenantable repair during the term, and at the expiration thereof, give up peaceable possession of the forge and premises, being the undivided half or moiety, to the said Joseph Huston."

Dennis Springer died on the 3d of April, 1823. His will contained the following provision : "My undivided half of Union forge, my desire is, that my sons Uriah, Dennis, and Josiah Small, shall receive from the rents, issues, and profits thence arising, two hundred dollars, in three equal annual payments, the residue of the said forge to be equally divided between my sons John and Jacob : " which Jacob is the defendant in this case.

On the 8th of March, 1823, the said forge became so dilapidated, by the walls and roof falling, that it was no longer tenantable. Jacob Springer, the defendant, who was now joint owner with John Springer of the moiety which had belonged to his father, Dennis Springer, deceased, applied to Joseph Huston to know his mind about rebuilding the forge. To this application Joseph Huston replied, that in the then circumstances and situation of his affairs, he must decline doing anything towards

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rebuilding the forge; that he supposed all he had would soon be sold by the sheriff. In September Jacob Springer proceeded to rebuild the forge, and made such repairs as were necessary to put the forge in operation, which he effected on the 1st of February, 1824.

On the 8th of June, 1815, the bank of Washington obtained a judgment against Joseph Huston, which operated as a lien on the interest of Joseph Huston in the said fifty-one acre forge and improvements with the appurtenances, and continued a lien until the said premises were levied on under it, and sold on the first Monday of March, 1824, to John Huston, the plaintiff. Joseph Huston died on the 7th of March, 1824, and on the 1st of June, 1824, a deed for the said premises was acknowledged by the sheriff and delivered to the plaintiff, by virtue of which he entered into possession thereof, and claimed the one moiety of the profits from that date; but Jacob Springer, the defendant, by virtue of the title derived under the will of Dennis Springer, and the rights incident thereto, has continued to receive the whole of the rents, issues, and profits up to the commencement of this suit, and has refused to pay over any part thereof to the plaintiff; but has applied them to the extinguishment of the expenses incurred in rebuilding the forge, &c., which has consumed the whole amount.

If, upon the above statement of facts, the court shall be of opinion with the defendant, the judgment to be entered for the defendant: but if the court shall be of opinion with the plaintiff, then judgment *quod computet* to be entered for the plaintiff; and it is *agreed that the amount due to the defendant shall be ascertained by Samuel Cleavenger and Ephraim Douglass, Esqrs., and Hugh Campbell, M. D. [*99]

The court below gave judgment for the defendant.

Ewing, for the plaintiff in error.

1. The defendant was bound to make the repairs as tenant of Joseph Huston. Styles, 162; Dyer, 33; Com. Rep. 627; Perkins, 738; 2 Saund. 420. The case in 1 Dall. 210, went on the ground that the destruction arose from the act of a public enemy. 13 Serg. & Rawle, 39; Johns. 44. Destruction of the premises will not excuse payment of the rent. 3 Call. 309; 2 Hen. & Munf. 408; 16 Mass. 238; 6 Mass. 63.

2. Joseph Huston could not be compelled to contribute for repairs or join in them. Tenants in common are compellable to repair only in cases of houses, castles and mills. 11 Co. 82, b; 2 Inst. 403; 4 Mass. 475.

3. But liens are to be paid out of the purchase-money. 7 Serg. & Rawle, 80; 3 Binn. 358; 14 Serg. & Rawle, 257, 262.

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The expenses of a lien ought not to be paid by the purchaser at sheriff's sale. If no lien, they were a personal charge against him who was a tenant in common when the expenses were made. We say it was a personal charge. 4 Johns. Ch. 334 ; 12 Mass. 65.

Baldwin, contra, was desired to speak only to the last two points. There was no agreement to be bailiff. Does the relation arise by the operation of law ? An action did not lie between tenants in common at common law. If Springer is entitled to indemnity, he has received no profits till the repairs are indemnified to him. Co. Litt. 200, b ; 1 Roll. Abr. 117, b ; 1 Com. 115 ; 4 Stat. at large, sect. 27, vol. 4, 208 ; Willes, Rep. 208 ; 12 Mass. 149. It is not material whether there is a lien. One joint owner may repair and take it out of the profits. In case of the death of one, would not his heir be liable to contribute ? In repairs made to ships, the partner making the repairs can hold till reimbursed. 9 Serg. & Rawle, 97. A tenant is reimbursed against a purchaser at sheriff's sale. 3 P. Wms. 158 ; 6 Binn. 193 ; 7 Serg. & Rawle, 438. These cases show that this was partnership property, and that a lien arose from the nature of the property. So 20 Johns. 620 ; Abbott on Shipping, 60 ; 1 Ves. 497 ; 2 Ch. Ca. 36 ; Amb. 255 ; Skin. 230 ; 8 Johns. Ch. 407, 8 ; 7 Serg. & Rawle, 411 ; 12 Mass. 65. No action of account will lie before demand and refusal.

Kennedy, in reply.—The case of ships is peculiar, 15 Johns. 159 ; 4 Mass. 424 ; 11 Mass. 469 ; that of joint owners of chattels is different.

The opinion of the court was delivered by

GIBSON, C. J.—Joseph Huston, the uncle of the plaintiff, and Dennis Springer, the father of the defendant, were tenants in common of a forge ; and this action is brought to have an account [*100] of the profits from the time when the plaintiff acquired the estate of his uncle. The defendant claims a right to defalcate certain expenses incurred by him before that time in repairs ; for which, he alleges, he ought to have contribution. The plaintiff alleges that the defendant was bound, by the terms of a lease from Joseph Huston, to make these repairs at his own cost ; that if this were otherwise, yet the expense was a personal charge against Joseph Huston, and, further, that if it were a charge on the property, it ought to have been paid out of the purchase-money in the hands of the sheriff.

In the lease it was agreed that "considerable new work and repairs must be done to the forge, such as roofing, and repairing

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the forebay and trunks ; and also the hammer and bellows wheels, so far as may be agreed on by Dennis Springer and Joseph Huston ; the expense of which repairs is to be kept correctly and particularly by Jacob Springer ; and the said Joseph Huston agrees to discount out of the rent one-half of such expense, provided it should not exceed the sum of one hundred and eighty dollars in any one year ; and the said Jacob Springer is to keep the said forge in good, tenantable repair during the said term, and at the expiration thereof, give up peaceable possession of the forge or premises, being the undivided half or moiety, to the said Joseph Huston."

When the repairs were made, Dennis Springer was dead ; so that the defendant held the one moiety as a tenant in common, and the other as the lessee of his co-tenant. And the first question is, whether he was entitled to contribution from his co-tenant, or bound to repair at his own cost, by force of the covenant to keep the forge "in good, tenantable repair."

We are happily relieved, by the terms of the agreement, from an examination of those hard cases, in which it has been held that the lessee is bound to rebuild, if necessary, where he has covenanted to repair, and deliver up the premises in as good condition as when he obtained the possession. Perhaps there is no relief against an undertaking so positive and unequivocal. But in this species of contract, as in every other, the intention is to govern. Here, then, there was no covenant to redeliver the premises in good repair. There was a covenant for tenantable repair ; but did the parties by this, contemplate anything more than ordinary repairs, which should become necessary by natural wear and decay within the term ? Whatever doubt might otherwise rest on their intention, is removed by their having, on certain conditions, provided for extraordinary repairs, rendered necessary by wear and decay previous to the term ; which would have been superfluous, had they intended to provide for them by the words "tenantable repair." These extraordinary repairs were designated by way of example, as "roofing, and repairing the forebay and trunks ; and also the hammer and bellows wheels : " all of which are generically, and one of *them [*101] specifically, the same as the repairs since made ; which, had they been made by the direction of Joseph Huston and Dennis Springer, would, undoubtedly, have been within the terms of the agreement and payable out of the rent. The existence of an agreement specifically applicable to them, then, shows that the parties themselves did not view them as included in the general covenant for tenantable repair. They had a right to put their own construction on the contract ; and where

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their meaning is evident from the whole, it will qualify general expressions in a particular part.

The contribution demanded is, for new walls and a new roof; and hence a doubt whether the forge was repaired or rebuilt; and, if the latter, whether a tenant in common can compel his co-tenant to rebuild. The expense, however, was incurred clearly in repairs. A forge essentially consists of its wheels, hammers, drum-beam, furnaces, and bellows. The walls and roof are a mere shed, and constitute so small a part of the cost, that no proprietor would hesitate to replace them, rather than abandon the business and sacrifice the capital invested in other parts of the stock. I have known a conflagration of the walls and roof suspend the operations of a forge but a few days. But the works consist of many other buildings, and capital is invested in various sorts of stock which could be employed in no other business. I should therefore say, the reconstruction of a forge, entire, would constitute repairs for which contribution would lie. It would seem, then, that these repairs were provided for only conditionally; and that as the condition on which the provision was to take effect, has not happened, they stand as if no provision had been made. The consequence is, that the objection to contribution, on this ground, is not sustained.

A more material inquiry is, whether the right of contribution be a personal charge against the co-tenant, or a lien on the profits of his successor. The writ *de reparatione facienda*, which lay at the common law, necessarily affected only the person of him who happened to be co-tenant when the repairs were to be made: and the modern remedy by bill in equity, I believe, goes no further. There are, undoubtedly, liens which do not exist at law, and of which equity alone can take cognizance; but no case can be shown where a tenant in common has been allowed to retain out of the profits that accrued after new parties had intervened. The only case that gives colour to the existence of a lien, under any circumstances, is *Scott v. Nesbitt*, (14 Ves. 143,) which involved transactions almost purely commercial. On the ground of a supposed usage, peculiar to Jamaica, Lord Eldon, at first, expressed an opinion that supplies furnished to a West India estate, would give a claim against the estate itself; which he retracted on the coming in of the master's report, which negatived the existence of any such usage. Still, however, he said the principle was, he thought, applicable to a species of landed estate even in England, which could not well be represented as mere landed property; as, for instance, *soil containing mines or alum works, in the management of which there must be expenditure incurred as between the tenants; and he thought

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chancery would not give an account between them, without making allowances that would not be given in the case of an estate managed in the ordinary course of husbandry. These are nearly his words; from which, it is plain, he thought that no lien can arise from the naked relation of tenure in common; but that where the tenants carry on a business to which the ownership of the soil is subservient, expenditure on the land, by one, ought to be reimbursed out of the profits: in other words, that the relation of tenants in such circumstances, partakes of the nature of partnership; and it is clear that profits are not to be divided till the debts are paid, whether owing to the partners individually or to strangers. But here there was no business carried on jointly; and therefore the foundation of the principle fails. But, in any event, a lien could exist only between the tenants themselves, and in respect of profits made while they were associated in business. To affect a stranger to their transactions, would be unjust in the extreme. But where there was no joint business, a lien against any one, has never been imagined. The responsibilities of joint owners of ships are regulated by principles peculiar to the maritime law. Such a lien, being secret and of indefinite continuance, would be intolerably mischievous and inconsistent with the scope of our legislation in favour of purchasers: and that no case is to be found in which it has been asserted, much less sustained, ought to be decisive against the recognition of it.

This decision of the principal point, renders a decision of the remaining one unnecessary.

Judgment reversed, and judgment *quod computet*; the amount to be ascertained according to the agreement of the parties.

Cited by Counsel, 3 W. 239.

[PITTSBURG, SEPTEMBER, 1828.]

Boggs, Administrator of Boggs, *against* Bard and Others, Executors of Johnson.

IN ERROR

It is no reason for rejecting evidence of a demand, that it is beyond the date prescribed by the act of limitations.

Where the debt to be recovered is assets, the plaintiff may name himself administrator, and sue as such on contract made by him.

[Boggs, Administrator of Boggs, v. Bard and others, Executors of Johnson.]

WRIT of error to the Court of Common Pleas of *Indiana* county.

[*103] *The opinion of the court was delivered by HUSTON, J.—This was an action of assumpsit by the plaintiff, and his demand consisted of an account settled with John Boggs, in his lifetime, by J. Johnson, and a claim by the plaintiff as administrator of J. Boggs against James Johnson in his lifetime. The demands are both of ancient date.

The settled account was admitted in evidence. The evidence of the assumpsit to the administrator was rejected, and to that exception was taken.

The reasons which governed the Court of Common Pleas we have not, but their decision has been attempted to be supported on the following grounds:—That the claim is very old, and barred by the statute of limitations: That the deeds offered in evidence, are between other parties, and not admissible here: And, that this part of the demand is one which cannot be joined with the claim for debt to John Boggs in his lifetime.

The first is no good reason for rejecting proof of the original debt. It is true, the statute of limitations, if pleaded, may bar it, but, evidence may be given, which will take it out of the operation of that statute, and this cannot be known until all the testimony is heard.

The parties are all relations, and the transaction on which the claim arose, although a little complicated, is one on which a demand might arise; and which, from the letter of J. Johnson, the deposition of Lawrey, and the deeds, may be easily understood. The deeds, to be sure, have only a remote bearing on the cause, but they are all referred to in the deposition of Lawrey; that deposition, and the letter, and the deeds, and record, make out, or are supposed to make out this case:

That John Boggs, in his lifetime, conveyed one-half of his farm to his son, Andrew, the plaintiff, and left the other half to pay his debts, and be divided among his daughters: That Andrew sold his half to R. Miles, for five hundred dollars, who offered the same price for the other half: That there was a judgment against John Boggs in Mifflin county, where he lived, and a deed in favour of J. Johnson, as administrator of Bailey: That it was agreed that the half tract left by J. Boggs, should be sold by Johnson on that judgment, and purchased by him, and then conveyed to R. Miles for the sum of five hundred dollars, which he offered; and the debt to Bailey's estate taken out of the purchase-money, and the balance go to the creditors of J. Boggs, or to his daughters: That the land of J. Boggs, deceased, was sold on that judgment, purchased by Johnson, and

[Boggs, Administrator of Boggs, v. Bard and others, Executors of Johnson.]

conveyed by him to R. Miles, who paid him the five hundred dollars: That part of this sum, which remained after paying the debt to Bailey's estate, is the subject of this suit. Whether the evidence offered proved this case, was for the jury, and it ought to have gone to them.

The deposition, which mentions deeds and records, cannot be read, *unless the deeds and records are produced. [*104] Deeds and records mentioned by parties in a contract, or referred to for dates and sums, may be evidence in a cause between suitors, who are no parties to those deeds or records—not for all purposes, not to show title, or to prove the points adjudicated in the suit, as a bar, but as proving facts material in a cause trying.

The last objection is also untenable. It is true, Boggs, as administrator, had, strictly speaking, no power to make this contract; but he made it, and no doubt is even intimated, that it was the best thing he could do for the estate he represented, and for his sisters. They do not complain, and never did. If he gets this money, it will not be his own; it was not understood or agreed to be his own. It was to be, and will be assets in his hands, as administrator, to pay debts, or to distribute. The papers offered, show there were claims against the estate, and at least, one sister to take it if there were no claims.

There are many cases in which an executor, or administrator, may sue, and may recover too, either in his representative, or individual capacity. Without going into a particular distinction, it may be laid down as a general rule, that where the money sued for will be, must be, assets, it is not error to name himself administrator. In this case the defendant ought not to make this objection; for we see on this record, evidence, that he expects to set off claims against the estate of J. Boggs. To meet this claim, if suit had been brought by Andrew, in his own name alone, the defendant would have found more difficulty in getting his defence before the jury.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 7 S. 154; 5 O. 611; s. c. 13 W. N. C. 135.

Cited by the Court, 14 W. N. C. 542.

[PITTSBURG, SEPTEMBER, 1828.]

Blair against Hum.

IN ERROR.

Though deeds between other parties are not evidence; yet, they become so when referred to in an agreement between the parties.

WRIT of error to the Court of Common Pleas of *Armstrong* county.

The opinion of the court was delivered by

HUSTON, J.—The plaintiff showed a judgment, execution, levy, and sale of the land in question, to himself. G. Armstrong was plaintiff in that judgment, and William Hum the defendant.

After the plaintiff had shown his title, Hum gave some testimony to show, that the plaintiff had agreed to purchase the land, to give it to Hum on his paying to Blair the sum for which it [*105] was *struck down; and that Blair had since said, he would keep it, because the money was not paid at the time agreed on. Blair called witnesses, present at the same time and place, who gave a totally different account, and he admitted, that he did make a contract with the defendant, and had always agreed to convey on the terms being complied with, and called a witness, who spoke to him to make it, and who was present when it was made, and his testimony was: That on Tuesday morning of the September court, in 1824, (the day the land was sold,) the defendant, Hum, and his father-in-law, came to the witness, and told him they had come to purchase his land at the sheriff's sale: That he had money enough to pay off the judgment on which the land was selling, but not enough to pay all the claims against the land. Hum said he had exchanged land with General Campbell, and had been in law ever since: That General Campbell had made a deed to George Armstrong, which he should have made to him. They then wished the witness to speak to Mr. Blair, to give them time to make up all the money which was against the land. The witness went with them to Blair, and repeated what they had said; and told Mr. Blair, Hum's statement, as to his treatment by Campbell, was true, and hoped he would do all he could for him. Blair replied, he would do everything he could for him consistently with his duty to Armstrong and himself: That he was not only attorney for Armstrong, but had an interest in seeing to the application of the

[Blair v. Hum.]

money, &c. Hum and Blair then agreed, that Blair should buy it, and then sell it to Hum : That Hum was to pay Blair whatever sum it would take to pay off all the claims against the land, and was to give him a reasonable time to pay the money : That two sums, viz., the amount of the judgment and the consideration-money in the deed from Campbell to Armstrong, were particularly mentioned. Hum then said, that claim through Campbell was unjust, but now he knew no other way than to buy it from Blair, and bring suit against Campbell. The land was sold. Hum's father-in-law did not bid, and the land was sold to Blair for less than the amount of Armstrong's judgment and costs.

Blair then offered in evidence a letter, or letters of instructions from Armstrong to him, and the deed from Campbell to Armstrong, to show the amount to be paid ; it was about one hundred and fifty dollars, and this was the real dispute between the parties.

These were objected to, and rejected by the court, and exceptions signed. The grounds on which this decision was attempted to be supported were, 1. That a deed, not between the parties, was not evidence. This is often true, but not always. Here it was offered, not as a conveyance of title, but as a paper referred to in the contract, and to show the sum which Blair alleged was due before the defendant got the land ; and next, the counsel went into the old contract with Campbell, and complaints against him and Armstrong. Now, with this Blair had nothing to do. None of the misconduct *was charged to him ; he entered [*106] into a contract at the instance of the defendant ; had made himself responsible to his principal ; and, the letters were offered to show that responsibility, and the deed, the amount of his claim. To reject this evidence was, in effect, to destroy the whole of the testimony of the witness to the contract ; for without the deed, to ascertain the sum, his testimony was inoperative. If his testimony was believed by the jury, the deed was most material. There was error in rejecting this evidence, and the judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Wh. 572.

[PITTSBURG, SEPTEMBER, 1828.]

The Commissioners of Mercer County *against*
Patterson.

IN ERROR.

The sheriff cannot call upon the county commissioners to refund the daily sum he has paid the crier of the court.

The statute of limitations would apply to such claim, if legal.

WRIT of error to the Court of Common Pleas of *Mercer* county.

Pearson and Bredin, for the plaintiffs in error.
S. Foster and Banks, *contra*.

The opinion of the court was delivered by

HUSTON, J.—To November Term, 1826, Nathan Patterson, the plaintiff below, brought suit against the commissioners of Mercer county, and declared for money paid, laid out, and expended, &c. ; and laid the assumption on the 1st of April, 1826. Pleas *non assumpserunt*, and *non assumpserunt infra sex annos*, and issues. N. Patterson had been sheriff of Mercer county during the years 1810, 1811, and 1812 ; and again during the years 1816, 1817, and 1818 ; and his claim was for money paid by him to the crier of the court during his respective sheriffalties.

The proof was by the crier, whose deposition was in these words :—"That Nathan Patterson, sheriff of Mercer county for the years 1810, 1811, and 1812, did pay him one dollar per day for crying the different courts of the said county during the said three years, and that Patterson also paid him the same sum per day as crier for the years 1816, 1817, and 1818 ; also, Patterson paid him seven dollars at an adjudged court, in the said county in the year either 1817 or 1818." Thus, there was no proof of when any part of the money was paid—I mean no express proof of the date—the last was nearest to it, and it was uncertain as to the date, which was probably ascertained by the docket.

[*107] *The commissioners resisted the whole demand, on the ground that it was never due ; and, if due, it is barred by the act of limitations.

[The Commissioners of Mercer County v. Patterson.]

It is, or must be conceded, that until within a few years, no sheriff ever made any demand against the county on account of money paid a crier. The fee bills, prior to the present one of 1821, all had an item, giving a specific fee to the crier, or rather for the crier; for it is found among the fees allowed to the sheriff. The usage, however, was, not that the sheriff should settle an account with his crier, and pay him so much on every suit; but by an express or tacit understanding, the sheriff kept the fee in the fee bill, which was carefully taxed in every case, and paid the crier a stipulated sum. In addition, the crier of the court, was crier of lands sold by the sheriff, for which the fee bill allowed a sum which was always paid to the crier. And long usage has authorized the crier to receive a dollar from each attorney admitted in the court. Thus the sheriff lost nothing; he paid the crier a commutation for his ten or twelve and a half cents, and gave him the precise sum due on the sale of each tract; and the purchaser, in most counties, also gave the crier a dollar, which, with what was paid by the attorneys, made it a small office, but a desirable one; and since rotation in office has become the order of the day, one in which the appointment is, in some counties, solicited; and a new crier comes in regularly with a new sheriff; in others, some old man holds it, as it were, by prescription.

There are certain duties beside the actual crying in court, which have usually been performed by the crier; for example, he brings a pitcher of water, if wanted; the wood being provided by the commissioners, he makes the fire; he, in some counties, sweeps the court-house, and when necessary, has it washed; for this latter, he is always, where he does it, paid by the commissioners. Another person is sometimes, nay, often, employed to do this; if he does it, it is because the commissioners employ him, and they pay him precisely as they would any other person. It is no part of the office or duty of the crier, and I do not understand it as any ground of the present claim.

The sheriff paid him a dollar per day, during court, as crier. By the fee bill, as it then stood, the sheriff was allowed a fee in each cause for a crier, or for each cause called in court; and he must act as crier or find one to act in his place. He has no colour for taking the fee, allowed by law for the crier, putting it in his own pocket, and calling on the county to pay the crier.

There was no understanding, either express or implied, that the county should pay the crier; no express agreement, and no usage from which one could be inferred. If he is a deputy of the sheriff, the fee bill settles the compensation; and since 1814 no court or jury can add to it. If not connected with the sheriff,

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[*108] or dependent *on him, the sheriff had no right to assume and pay for the county, without their knowledge, and against their will.

There has been growing for some years a strange disposition to slip a finger into the public funds. A man solicits and obtains the most lucrative office in the county, and, if it is not his own fault, lays up, from the profits of it, a handsome provision for his future life; and then he talks of certain small matters of expense incident to it, and asks the county to pay him for them. Thus prothonotaries have sued the county for the price of their printed blanks, of their pens and wafers and ink powder; and, if not discouraged, we might expect soon to see accounts by sheriffs for horse hire, and feed, &c., &c., and for salaries to deputies, &c. It is time it was known, that every officer accepts his office with its incidents, and its legal emoluments and legal expenses and inconveniencies; if he does not like these, let him decline the office; if he accepts it, he has no right to take from individuals, nor to claim from the county, under colour of his office, anything not given to him by the law.

The statute of limitations was also a positive bar to the recovery. Where it is pleaded, the plaintiff must prove the *assumpsit* within six years. It will not do to prove a debt fourteen years old, was paid for the defendant's use, and then leave it to a jury to decide whether it was paid within six years.

Judgment reversed.

Cited by Counsel, 3 Barr, 464.

[PITTSBURG, SEPTEMBER, 1828.]

Sharpless *against* Tate.

IN ERROR.

On the plea and issue of *non damnificatus*, in a suit on a mortgage given to secure to the plaintiff the future conveyance by certain heirs to him, the plaintiff cannot give in evidence, to show the amount of damages he sustained, that he had, since the suit, purchased of the heirs, and the conveyance from them to him.

WRIT of error to the Court of Common Pleas of *Fayette* county.

The opinion of the court was delivered by

HUSTON, J.—On the 25th of March, 1809, Isaac Hill and wife conveyed twenty-eight acres of land on the north side of Redstone creek to Jonathan Hill and John Tate, in consid-

[Sharpless v. Tate.]

eration of fifteen hundred dollars. On the 20th of January, 1810, Jonathan Hill and John Tate conveyed the same to Jonathan Sharpless, in *consideration of fifteen hundred dollars. On the 4th of September, 1799, the will of John Tate the elder was made, and proved in December, 1799, devising a life estate in certain lands to his son Robert, and the fee to his children, and making his widow, Rachel, and S. Jackson, executors. On the 21st of February, 1809, Rachel Tate sells to Jonathan Sharpless one hundred and twenty-eight acres on the south side of Redstone, patented to Robert Tate in 1784, and for which she had a sheriff's deed, but does not say whose title was sold; but it was sold as Robert's. On the same day, on the 21st of February, 1809, Rachel, John, and Robert Tate gave a bond in eight thousand dollars to Jonathan Sharpless, reciting the will and deed above mentioned; and conditioned that the heirs of the said Robert Tate, shall, with himself, as they severally come of age, make over all their right, claim, and demand, &c., in the premises to Jonathan Sharpless. On the same day John gives a mortgage on the half of one hundred and fifty acres, called Tateston, to Jonathan Sharpless to secure the payment of the said bond. On the 17th of April, 1827, John Tate and Edward Tate (the sons of Robert), reciting all the titles and will; and, that they are the children of Robert, to whom this land was devised, sell to Jonathan Sharpless for fifteen hundred dollars and ten cents.

Jonathan Sharpless	}	No. 273, of October Term, 1822. <i>Scire facias</i> on mortgage.
v. John Tate.		

This is the mortgage above cited. On the 2d of September, 1823, John Tate confessed a judgment, by writing filed, for six thousand dollars. On the 15th of August, 1826, the judgment was opened to permit Jonathan Hill, who had purchased the mortgaged premises at sheriff's sale as John Tate's land, to make defence, and the cause was put to issue on the pleas of payment with leave, &c., and *non damnificatus*; to which a special replication was made, stating, that Sharpless had been obliged to purchase the land from the heirs of Robert Tate, &c., and issues on all.

On the trial of these issues, the plaintiff, after giving in evidence the above deeds, offered to show the amount for which the land sold at public sale, since the bringing this suit, in order to show the value of the land sold by Rachel Tate to Jonathan Sharpless, to secure which this mortgage was given; at which sale Jonathan Sharpless was the highest bidder and purchaser.

[Sharpless v. Tate.]

This was objected to, and rejected, and an exception was taken. This was the first error assigned.

The plaintiff then proved, by John Tate, that at the execution of the mortgage, Jonathan Hill knew the object for which the plaintiff purchased the land on the south side of the creek from Rachel Tate, and that he intended to erect valuable water-works, and offered the same evidence again as in the former bill of exceptions, accompanying it with the offer of the deed from [*110] John and Edward *Tate, the children of Robert, to show the sum he was obliged to give for the land, and thus determine the *quantum* of damages. This was again rejected, and forms the second bill of exceptions. There was no error in rejecting this testimony. I do not say, that in no case, on the trial of an issue of *non damnificatus*, can the plaintiff give evidence of what occurs after suit brought; nor do I say that, in any case, he can. It is not necessary to decide that matter in this cause: nor do I decide, that where a man situated as Sharpless in this case was, buys in the adverse title to save himself, after making improvements, which he is in danger of losing, his own acts can in no case be given in evidence. Nothing is decided on the general question: but, in this case, after suit brought, and issue joined on the plea of *non damnificatus*, the plaintiff went and purchased the land, and offered that purchase, and the deed which evidenced it, to support an issue joined in a suit brought some years before; and not only to prove that he had suffered damage, but also to prove how much. The court very properly rejected this evidence.

Judgment affirmed.

END OF SEPTEMBER TERM, 1828.—WESTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

WESTERN DISTRICT—SEPTEMBER TERM, 1828.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Minich and Another, Administrators with the Will annexed of Cozier, *against* Cozier.

IN ERROR.

In an action brought by two administrators, with the will annexed, on a bond given to the testator, the defendant cannot, under the pleas of payment with leave to give the special matter in evidence, and set-off, prove, that upon a settlement of the testator's estate, the debts had all been paid, and the legacies satisfied; and that the bond in question, with other moneys, received by the administrators, remained to pay and satisfy the legacies and shares of the administrators in right of their respective wives; and that in consequence of the receipt of other large sums by one of the administrators, A., the said bond belonged to the other administrator, B.: That the defendant, before the suit was brought, had paid as surety of B., sundry large sums on his account; and further, that B., before the commencement of the suit, had applied for, and obtained the benefit of the insolvent laws: That the defendant had been appointed his assignee, and regularly qualified as such.

WRIT of error to the Court of Common Pleas of *Perry* county.

The error alleged, was in rejecting the defendant's set-off. The action was debt on a bond executed to the testator in his lifetime. Plea, payment with leave to give the special matters in evidence, and with leave of set-off and defalcation. The set-off proposed, was in these words:—

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“The defendant, under the issues in this case, offers to prove, that the plaintiffs, John Minich and Peter Stroup, are administrators with the will of John Cozier, deceased, to whose estate the bond in question belonged: That upon a settlement of [*112] the estate of *the said John Cozier, deceased, the said administrators paid, and distributed to the respective legatees, their full shares in the estate of the said testator, by the payment of money, and delivery of other bonds belonging to the estate: That all the debts against the said estate have been fully paid by the said administrators, out of other money and proceeds of the estate; and that the bond on which this suit is brought, together with other moneys received by the said Minich, &c., as administrators, remained after the aforesaid division of the estate, to pay and satisfy the legacies and shares of the said Minich and Stroup, in right of their respective wives; and that, in consequence of the receipt of other large sums, by the said Minich, as administrator, the whole amount of bond now sued belongs to the said Stroup: That the defendant, before the bringing of this suit, as the surety of the said Stroup, paid sundry large sums of money for, and on account of the said Stroup; and further, that before the bringing of this suit, the said Stroup applied for, and obtained the benefit of the insolvent laws, and the defendant was appointed his assignee on the 8th of August, 1825, and has been regularly qualified as such assignee, and done all things necessary to qualify him to act as assignee.”

All this evidence was objected to, overruled by the court, and a bill of exceptions sealed. It appeared that there were twelve other bonds of one hundred pounds each, falling due annually, from the defendant to the testator's estate, the last of them payable in 1831.

Carothers, for the plaintiff in error.—An equitable set-off may be permitted. It ought to be so here, to prevent an irreparable injury. The real plaintiff is Stroup. The money, if recovered, goes into his hands. He owes a just debt to George Cozier, and is insolvent. G. Cozier is his assignee. If he cannot retain, his debt remains, probably forever, unpaid. So that the set-off here is not merely to prevent circuity of action, but to prevent the recovery of a most unjust claim on one side, and an absolute loss on the other. Even in England, where equitable relief may be had in chancery, the courts of law, in questions of set-off, look to the real parties in interest, without regarding the names on the record. Here the inquiry proposed, will not be more multifarious than often happens in the case of an equitable defence;

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nothing more than was admitted in the case of *Harper et al. v. Kean*, 11 Serg. & Rawle, 280. Every defence resting on equity, must, in some degree, present the same difficulty, and must require the same departure from the strict rules of law. G. Cozier being the assignee of Stroup, what he is here permitted to retain, he will be compelled to distribute to the creditors of the insolvent. He cited, *Stewart v. Coulter*, 12 Serg. & Rawle, 252, 445; *Murray v. Gray's Administrator*, 3 Binn. 135.

Miller and Metzger, contra.—The administrators must be entitled to recover the money which they are bound to account for. *A debt to be set off, must not be in a totally different right from the debt in suit. This has been the in- [*113] variable rule. *Darrach's Executors v. Hays' Administrators*, 2 Yeates, 208; *Stiles v. Donaldson*, 2 Dall. 264; *Waln v. Anthony's Executors*, 5 Serg. & Rawle, 468; *Waln v. Wilkins*, 4 Yeates, 461; *Dunkin v. Calbraith*, 1 Browne, 14. The proposed set-off, is an attempt unheard of before, and the perplexity of the thing cannot be exceeded. Half a dozen disputes are to be dragged from a distance into this cause, and more than half a dozen different parties to be in effect substituted, and to be bound by the result, though they are not in court, and have no right to be heard. To heighten the confusion, if possible, even the creditors of Stroup are to be substituted in effect: or if not so, G. Cozier, the assignee, if he can set off his debt, secures to himself a priority before them. *Wolfersberger v. Bucher*, 10 Serg. & Rawle, 10.

The opinion of the court was delivered by

TOD, J.—We see no error in this record. There is a simplicity in the law which, to the extent here asked for, cannot be broken in upon. It seems agreed, that a defendant in a suit by administrators is not permitted, by the general rule, to set off a debt due to himself from one of the administrators, altogether unconnected with the estate in right of which the suit is brought. But it is said, here are numerous facts proposed to be given, to take this case out of the rule. Now, to my apprehension, the very multiplicity of the facts offered, would seem to forbid the attempt. Not only is the debt said to be due from Stroup to be proved, but a settlement of the estate and a distribution of the assets, though the suit itself is an effort to recover a part of the assets, and one of the pleas is payment, and twelve more bonds are yet claimed as payable from the same defendant. Next is to be proved a settlement between the two administrators; then the full payment of all debts; the full payment of all legacies;

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and next, the means by which the bond in question, though given to the testator in his lifetime, had become the separate property of one of the administrators. Admitting that Minich, the other administrator, being in court, might have an opportunity to controvert the proof offered, as far as it denied his interest, and thus be allowed the means of prosecuting two contests at a time; one against his co-administrator and co-plaintiff, and the other against Cozier, the defendant; yet, what shall be said to legatees, to creditors, or those who may claim to be such, and may not be willing, that full satisfaction of their demands shall be made out against them, in a suit between other men, but whose rights may be decided on without a hearing; unless each one, upon notice given, may be permitted to come in and defend for himself? Whether they come or not, I apprehend, the jury and the court would not find themselves the less entangled in a complication of issues of fact and disputes, in their own nature, [*114] *wholly unconnected with each other, brought together, against all precedent in the law, by this plea of set-off. Besides, though the defendant's first plea is on his own account, payment by himself, yet, he offers the set-off in the character of assignee of Stroup; then, if he succeeds, that is, if he pays his own debts to the administrators by the set-off, he either gains for himself an unequal distribution out of the insolvent estate, or he puts a great difficulty in the way of calling him to account as assignee; it being next to impossible to know from the record, if the jury make a deduction, whether they make it under the plea of payment, or under the set-off. As to the supposed hardship and the risk of the money going possibly into the hands of the insolvent administrator, clearly this administrator may be called upon to give good security, if he has not already given it, or may be removed from the office. The hardship appears the very same upon the defendant, that it would be if Stroup had never been administrator at all, or being administrator, had been removed.

There was another exception to the opinion of the court below. The bond sued on having been given in part pay for land, the defendant, to show a failure of consideration, produced the record of a recovery in a writ of dower out of the same land. The plaintiffs were permitted to repel this evidence, by showing a release by the demandant in dower, though executed long after this action was brought. It was assigned for error, but given up without argument.

Judgment affirmed.

Cited by Counsel, 1 J. 380.

Commented on by the Court, in 8 W. 75; and cited, 2 W. & S. 389.

[CHAMBERSBURG, OCTOBER, 1828.]

Anderson and Another *against* Nesbit and Others.

IN ERROR.

Where one conveys land which has been surveyed and returned, and describes it as land held on a warrant of a certain date, and in a certain name, all the land embraced by the survey passes, though the purchaser did not at the time of the sale know, that a certain part was included, and afterwards, frequently spoke of it as the land of the seller; provided the interest of third persons be not affected by such declarations.

And this is more emphatically the case, where the seller is an executor, with power to sell, and has, through a mistake, in supposing it to be vacant land, cut off part of the testator's estate, and appropriated it to his own use.

But it seems, that if the purchaser has got a title to such part, without having paid for it, he will be a trustee for those beneficially interested.

WRIT of error to the Court of Common Pleas of *Perry* county, in an ejectment brought by William Anderson and Samuel M'Cord, against Allen Nesbit, Samuel Nesbit, and Fisher Nesbit.

**Alexander and Carothers*, for the plaintiffs in error. [*115]
Miller, contra.

The opinion of the court was delivered by

HUSTON, J.—This is an ejectment, in which the plaintiffs here were plaintiffs below. Alexander Murray died before 1793, leaving four daughters, one of whom afterwards married the plaintiff, William Anderson, one married M'Crea, one married Allen Nesbit, Sen., and one married William Fisher. He made a will, and appointed his widow, William Fisher, and Allen Nesbit executors. He died possessed of a valuable tract of land; and further, on the 18th of June, 1774, a warrant issued to William Irwin for fifty acres, on which a survey of fifty-six acres and one hundred and forty-seven perches was made by S. Lyon, deputy surveyor, on the 23d of June, 1787. It was admitted one-half of this land belonged to Alexander Murray. On the 4th of October, 1793, Francis Irwin, the only son and heir of William Irwin, made a deed to William Fisher, one of Murray's executors, for the use of the legatees of the said Murray, for one undivided half of the said tract, to be taken off the upper end of the said tract, adjoining the said Murray's land, containing in all fifty acres, more or less, surveyed on warrant in June, 1774.

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On the 4th of April, 1794, Francis Irwin sold his own half to William M'Cord. After reciting, that he had conveyed one-half to William Fisher, he conveys the other undivided half of the before described tract, in consideration, &c. William M'Cord's representatives, by legal conveyance, sold this half to William Anderson, on the 15th of January, 1823, describing it as one equal half of the said warrant and right for fifty acres, held on warrant, dated, &c., as above.

Alexander Murray, by his will, devised to his daughters, Margaret, Mary, Isabella, and Jane, all his estate, real and personal, to be equally divided among them; to be at their disposal among their children, as they shall think them deserving. After some small legacies, he adds, "also all the plantation I now live on, to be sold after my wife's decease, and divided as before." On the 6th of April, 1811, Allen Nesbit and wife conveyed to Allen Nesbit, Jr., and John Nesbit, reciting Murray's will, and Mrs. Nesbit's title to one-fourth of the two tracts of land, and describing the larger by courses and distances, and the other as twenty-five acres, being half of a fifty acre warrant, granted to William Irwin; and sold Mrs. Nesbit's fourth part of both tracts, subject to the widow's dower. William Fisher was then dead. Before this, in 1802, Allen Nesbit and William M'Cord, had met on the land, and made a division by parol; and a Mr. Morrison had, as was supposed, run round the whole tract, and marked a division line. Although the survey, made by Mr. Lyon was returned, yet it would seem, this was not known to the owners, for Morrison's survey left out a long narrow *strip adjoining Murray's other land, and containing about fifteen acres, and in other respects differed from the survey, which was well marked on the ground, and from the return in the office. Immediately after this division, Allen Nesbit bought a Wyoming credit, and took a warrant on it, surveyed on this land so left out at the division, together with a few acres adjoining, which perhaps were really vacant; and there was no proof in the cause, whether this was fraud or mistake in Nesbit. But, from that time until 1824, perhaps all those interested, remained ignorant that it was included in the return of survey, as well as the marked lines on the warrant to William Irwin.

On the 14th of June, 1814, (the widow being dead,) Allen Nesbit, as surviving executor, sold the whole estate at public sale to William Anderson, (including the fourth part sold before to Allen and John Nesbit; but Anderson immediately conveyed the same fourth to them.) In the deed, the mansion tract was described by courses and distances; and also, the one-half of the above-described tract, surveyed in pursuance of a warrant

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granted to William Irwin, &c., and covenanted, that "the said Nesbit has not heretofore done, or committed any act, matter, or thing, wittingly, or wilfully suffered to be done anything whereby the premises hereby granted, or any part thereof, is, are, or shall, or may be impeached, charged, or incumbered, in title, charge, or estate, or otherwise."

Allen and John Nesbit conveyed their fourth part, described as in the deed of Allen Nesbit and wife, to Samuel M'Cord, the other plaintiff. The plaintiffs showed, and it was admitted, William Anderson was the owner of Jane M'Crea's share. Mrs. Fisher's share appeared to be outstanding then, but it was sold with the rest to Anderson by Allen Nesbit, surviving executor, and thus the title to the whole was vested in the plaintiffs. On this same 14th of June, 1815, Anderson executed a release in full and general terms to Allen Nesbit, for the shares of his wife, and of Mrs. M'Crea.

In 1823, Anderson applied for a patent for the land, and then saw the draft, and discovered that it embraced the fifteen acres for which this ejectment is brought, and which it is admitted he did not know were included in the survey on the warrant to William Irwin at the time of his purchase.

The defendants, who are the children of Allen Nesbit, claimed these fifteen acres as their own, and showed the warrant, survey, and return of their father in 1803, as good title. This the court very properly decided was no title; because, at that time, a warrant, survey, and return, not founded on actual settlement, was void; and because, an executor could not take land surveyed and returned by his testator, and which, as executor, he was bound to give to the devisees.

But it was further contended, that Anderson did not know these fifteen acres belonged to the testator; did not think he had purchased it, and after his purchase, frequently called it Nesbit's land, *and really thought it was his, from 1815 [*117] till 1823; and in this part of the case the court were mistaken in the view they took of it. If a man sells land which is surveyed and returned, and he describes it as so much land held on a warrant of a certain date, and in a certain name, it is as certain and precise a description, as if the deed had recited the courses and distances of the survey. The description then, in the several deeds, and among others, in the deed of Allen Nesbit to Anderson, of this land, as one-half of a tract of land, surveyed in pursuance of a warrant to William Irwin, dated the 18th of June, 1774, containing fifty acres, more or less, was precisely equivalent to a conveyance reciting the courses and distances in the return of survey. Considering it in this point of view then, it is conveyed to

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Anderson and M'Cord, by a description which cannot be mistaken; and in such a case, and where it is under a misapprehension, said repeatedly, that the land was not his, belonged to Nesbit, &c., these parol declarations do not destroy the title. If, in consequence of these declarations, Nesbit had sold it to an innocent purchaser, some difficulty might have arisen. This in a common sale. But it is out of the question, that an executor should cut off for himself a part of the estate he is selling, give a deed embracing that part, but deceive the buyer as to the lines, and then keep the part so cut off. Admit he was mistaken, he cannot mistake himself into the ownership of property intrusted to him for others.

But it was said, this land was devised to executors to be sold, and this broke the descent: That neither the heirs nor their alienee had a right to land, but to the price of land; and that, therefore, the plaintiffs cannot recover. Admit this, (for myself I only admit it with exceptions not a few,) it does not apply here; for first, as to M'Cord's part, he holds it under two conveyances, one from Nesbit and wife, as the wife's fourth of her father's estate; and an executor who has power to sell as executor, a share as heir, and sells as heir, shall never be permitted to say, his own deed passes no title. But, if he could say this, yet he sold the whole as executor, and both Anderson and M'Cord hold under his deed as executor; it is in their deed, and thus they can recover. Anderson has a conveyance through William M'Cord for Irwin's half, and he can recover that half under this title.

But further; although land is devised to an executor to sell, if he refuses to sell, if he denies the trust, and says, the land is his own, as we have no Court of Chancery to compel him to convey, the only mode heretofore in use, is to bring ejectment, and recover the possession; and that is precisely the case as to the part now in question.

It has, however, been argued, that Irwin and S. M'Cord, not having understood, at the time of their several purchases, that they were buying the land in question, it is unjust to the heirs, that they should get it without paying for it. This comes with [*118] a bad grace *from those who meant to defraud, or perhaps mistake the heirs out of it. But Anderson and M'Cord represent the heirs, except Mrs. Fisher's one-eighth; and are entitled to it, whether land or money. If money, Anderson has a right to his wife's share as husband, surviving her, or as guardian of his child, (and it appears he is guardian,) or as trustee of his child, for he has declared in writing, that he holds one-fourth for her; and as assignee of Mrs. McCrea, of her share; and M'Cord has the share, be it land or

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money, of the mother of the defendants. I admit, that if this part were of value, and these men had got the title to it, without paying for it, they would be trustees for those beneficially interested, and must, in equity, account for it. But, as this case stands, they would only have to account to themselves, except for Mrs. Fisher's share. Still having the legal title, they can support an ejectment against a wrong-doer, against any but the *cestui que trust*. The defendants are not the *cestui que trusts*. Allen Nesbit parted with the trust, by his deed to Anderson. He held this back as a spoiler; his children hold it so, and cannot hold in law or in equity, in despite of either the plaintiffs or Mrs. Fisher. Possibly, however, there is so little value in the property in dispute, that the expense of recovering it, will be double the value; and as the *cestui que trust* would be called on to pay this expense, there will be no claim by Mrs. Fisher or Jane M'Crea, about it.

There were several other points made in this cause, which, from the view taken of it here, need not be noticed.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Penn. R. 458; 3 W. 119; 7 W. & S. 354; 8 Barr, 154.
Cited by the Court, in 2 E. 195.

[CHAMBERSBURG, OCTOBER 15, 1828.]

Carson *against* M'Farland.

IN ERROR.

An administrator who has paid money within the year to a creditor of the intestate, on account of a just debt, cannot recover it back, on the ground that, by reason of deficiency in the assets, not arising from their accidental failure, it afterwards appears to have been an over payment, by mistake.

WRIT of error to the Court of Common Pleas of *Franklin* county.

Chambers, for the plaintiff in error.

Crawford, *contra*.

The opinion of the court was delivered by

HUSTON, J.—The case stated was to be considered as a special verdict. The following is an abstract of the facts: On the 15th of May, 1822, Thomas Carson, the plaintiff, took out letters of administration *on the estate of John Huston, deceased. [*119] He filed an inventory in due time, and held a vendue of the personal property, which personal property amounted to

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above four thousand dollars. On the 14th of March, 1823, Thomas Carson paid to the defendant two hundred and twenty-three dollars, and forty-six cents, being the amount of a single bill given by John Huston, in his lifetime, to the defendant.

John Huston was one of the sons of James Huston, deceased, and had shortly before his death taken, under a decree of the Orphans' Court of Franklin county, a part of his father's estate, at an appraisement, and entered into recognizances to pay to his brothers and sisters their shares of the said lands.

In August, 1823, his administrator, Mr. Carson, applied in due form of law to the Orphans' Court, for an order to sell the lands of John Huston, deceased, to enable him to pay the debts. Not being able to obtain a satisfactory price, the order was continued at several subsequent courts; and, in February, 1825, the land was sold for eight thousand four hundred and fifty dollars, and in April following, the sale was confirmed. It now appeared, that the proceeds of the whole real and personal estate would not pay the debts of the deceased; and, on application of the administrator, the court appointed auditors to apportion the money among the creditors. In April, 1827, their report was made and confirmed by the court. By this report, the whole proceeds were required, to pay debts of a higher degree than specialties: in fact, the recognizances were not all paid, but the conusees have received something less than their whole debts.

The plaintiff then brought this suit to recover back from John M'Farland, the defendant, the sum of two hundred and twenty-three dollars and forty-six cents, alleging it was paid him under a mistake as to the solvency of the estate. There was no allegation of any actual wasting by the administrator; the deficiency arose from the accumulation of interest, and the depressed price of lands.

It will be observed, that, in this case the administrator paid the money within the year, and to a person undoubtedly a creditor of the estate; and that, if there was any mistake as to the solvency of the estate, such mistake arose not from any statement or representation of the defendant, but from some other cause.

The law, as it regards the liability of administrators or executors, and how far, and under what circumstances, they may become personally liable for the debts of the estate they represent, is not an unimportant part of our jurisprudence. I do not mean to go out of the present case, or even to hint an opinion on some

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of the topics discussed, and which must present themselves to the mind.

In England, after some variance of decision, it seems to have been settled at one time, that a creditor, or even another legatee, could, in some cases, compel a legatee, who had received his legacy, to refund, in case of a deficiency of assets. This is, however, with some *restriction; for, if the assets were [*120] sufficient at the decedent's death, but were wasted by his executor, there was no refunding in favour of the legatee, or perhaps of the creditor; and a further distinction seems to have existed, as to refunding in favour of the legatee or creditor, when the executor was insolvent, and in favour of the executor, who would lose, unless he could compel those who had received to refund. See 1 Vern. 94, 460, 469; 1 P. Wms. 495; 1 Anstruther, 112; Com. Dig. 630; Chancery, Legacy, (3 G. 3); 1 Vern. 162; 2 Johns. Chan. 626, 627.

But even there, on reading carefully the cases cited, there will be found some reason to believe it was only where refunding receipts were taken, or in consequence of the peculiar jurisdiction and authority of the Court of Chancery, that any one, who had received only what was at the time supposed due to him, would be compelled to refund. 2 Com. Dig. Chan. (3 G. 3); 2 Ventris, 360. There is in 1 P. Wms. 355, (Pooley *et al.* v. Ray,) a *dictum* of the Master of the Rolls, that a creditor who has received money due him from the estate, may be sued, and compelled to refund in favour of another creditor; but, on a rehearing of the case, nothing is said on this subject. 2 P. Wms. 291, 297; Coppin v. Coppin, 2 Ves. 192. There is not, it is believed, in the English authorities before our Revolution, any direct decision, that a creditor, who has been paid a debt due him, may be compelled to refund in favour of another creditor; though it must have often happened, that one received all the assets, and another received nothing, or was paid out of the estate of the executor; and there are express decisions to the contrary. See 2 Ventris, 260; Com. Dig. Chancery, 393.

In this case, the administrator paid money justly due, and paid it within the year allowed by our law, to ascertain the situation of the estate. The assets were, or ought to have been, better known to the administrator, than anybody else. No accidental failure of the fund occurred, to any material extent; the defendant has no money to which in honesty and conscience he is not entitled, as against the estate of the deceased. The hardship on the plaintiff may be great. The hardship on the defendant, if called on to refund, would not be small; and the confusion, inconvenience, and general uncertainty which would

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follow from a decision, that, an honest creditor, who had gotten an honest debt, was liable to be sued, and compelled to repay, would be so great—would make the settlement of estates so uncertain, and so interminable, that we think the plaintiff ought not to recover.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 113; 3 W. 266; 9 H. 303; 6 C. 59; 1 G. 363; 14 S. 385; 24 S. 171, 372; 3 N. 393; s. c. 4 W. N. C. 406; 5 O. 254.

Cited by the Court, 3 R. 140; 1 Wh. 226; 2 Barr, 484; 3 Barr, 114; 5 Barr, 518; 1 H. 240; 11 N. 206.

The fact that one who makes a voluntary payment makes it under protest, does not better his position: 30 Pitts. L. J. 128; 1 W. N. C. 621; 1 Wr. 371. But a payment with protest under circumstances amounting to duress may be recovered: 8 H. 421; 7 S. 443; 7 N. 133. Payment by a *terre tenant* of a debt supposed to be a lien, after execution has issued upon it, has in two instances been held to be voluntary and irrecoverable: 5 Barr, 516; 5 O. 250. In this last case, three of the Justices dissented.

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*[CHAMBERSBURG, OCTOBER, 1828.]

Crist and Another *against* Brindle and Another.

IN ERROR.

Defendants sued on a bond given by them to executors, for a debt due the testator may set off a debt due to one of them, (he being the principal, and the other defendant surety,) by the testator, for work done.

Evidence is admissible on behalf of the defendants in such suit, that, at a former trial, on another bond, the set-off was not allowed, because the counsel for the plaintiffs agreed, that it should be admitted on the present bond.

WRIT of error to the Court of Common Pleas of *Cumberland* county.

Penrose, for the plaintiffs in error.

Carothers, *contra*.

The opinion of the court was delivered by

HUSTON, J.—The plaintiffs below, who were the executors of Brindle, gave in evidence a bond, executed by Crist and Holdeman. There were several pleas and issues; payment with leave, &c., set-off, and issues, and notice of special matter given.

The defendants offered to prove, that Crist had erected an office, and other buildings, for Brindle, in his lifetime, and that the amount justly due on this account was one hundred and sixty-one dollars, and sixty cents: That, at the time the bond

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in question, and some other bonds previously due were executed, it was agreed, that Crist should have credit for this sum on one of the bonds: That this credit was actually indorsed on one of the previous bonds, by one of the executors; but, on the trial of a suit on that bond, the credit was not allowed, because it was agreed by the counsel in that cause, who had then brought the suit now trying, that the credit should be admitted on this bond, if it was really due to the defendants.

To the admission of this evidence the plaintiffs objected.

1. That it is not good as a set-off, for that the bond is to the plaintiffs personally, and the account offered is against the testator.

2. That the agreement offered does not apply to the bond in question, and does not authorize such a set-off.

3. That it is a joint debt, against two, and the offer is of a set-off, due to one of the defendants.

The defendants renewed this offer, with the addition, that J. M. Holdeman was only the bail of Crist, who is the real debtor.

The above is in substance the whole of both offers. Some irregular discussion took place, as to what could have really been proved. We must take it on the offers, as on our paper-book.

The court did not, as is usual, simply decide to receive or reject the evidence, but put on the record the following reasons: "The *executors, by taking this bond, were liable to [*122] the creditors of Brindle for the whole sum; they cannot be embarrassed in the recovery of it, by the claims of one of the defendants against Brindle in his lifetime. Crist had this claim, and might have pursued it against the executors; and had it tried alone, unembarrassed by any other matters. This claim is by the executors, or it is by them personally; in either event it is in a different right from that in which the set-off is claimed; there is no mutuality. The agreement does not refer to this bond. The authority cited is in favour of the plaintiffs, on the third objection made to the admission of the evidence."

The matter is not of much value, but the points in dispute are of general application. At first view, there might appear some inconsistency in the decisions; it will, on examination, be found confined rather to the *dicta*, than to the decisions.

Where executors or administrators sell the personal or real estate of the deceased, and, as is universal in this state, take bonds for part of the purchase-money, we find some confusion as to the nature of these bonds. From a desire to support them, in suits on them, it has been said, they are the personal

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property of the executors; that naming them executors is only surplusage, &c. In point of law and fact, this is true only with great limitation, and restriction. Administrators, by order of the Orphans' Court, sell lands, to be paid for one-third in hand, and the residue in two years, to be secured by bonds. If the administrator take the bonds, and die, these bonds do not belong to his estate, but to the estate of the intestate, and ought to be delivered to the administrator *de bonis non*, of the first intestate. The representatives of the administrator will be badly advised if they claim them, or any interest in them. If the administrator did not die, but on application was removed, the court would compel him to deliver them over.

So, of notes taken for the sale of personal property, always sold at vendue on credit, and notes taken. The administrator taking notes or bonds, as administrator, is not personally responsible in any of these cases, if he acts fairly, and with as much care as is usually shown by a prudent man in conducting his own business. 2 Com. Dig. 530; Chancery, Assets, 2 G. 2; Cas. Chan. 74. If an executor does an act in good faith, and for the benefit of the estate; as, if he release a debt to a tenant supposed insolvent, to get him off the land, he is not answerable. 2 P. Wms. 381. Even if he were mistaken in the state of facts, yet, if acting for the best, he is not liable. 2 Johns. Cases, 376. If robbed, he is not liable. 1 Caines's Cases, 96. So, if he pays money to his solicitor, to pay a debt, and the solicitor is robbed. 2 Ves. 240.

The old cases at law are very harsh, and so are some of the modern ones. The business relating to them, and their accounts, are now settled in courts of equity, and more conformably to justice. Equity will not always pin him down to an admission [*123] of assets; as, *if the money were in a banker's hands, (and the best banker in England may fail;) that, undoubtedly, will not bind him, but he must make out his case—he must prove that mistake in once admitting assets, and the circumstances from which they failed. 2 Ves. 85. Where an executor gives his own recognisance to pay creditors, and houses in London are burnt down by fire, by which the greatest part of the assets are lost, there shall be no remedy on the recognisance beyond the assets which remain. 2 Com. Dig. 531; Chan. Assets, 2 G. 2; 2 Vern. 57.

The executor is not then liable to creditors, at all events, for the whole amount of a bond he may take: he may increase his difficulty, by taking or suing it in his own name; but it is his duty in many cases to take bonds; and if he does, and uses

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proper care, and acts honestly, he is not liable at all events for the amount of the said bonds.

The British statute, 2 G. 2, of set-off, expressly makes debts to or from the testator the subject of set-off. That statute does not apply here; but our act about defalcation embraces the case. 1 Binn. 64. Set-offs are agreeable to reason and justice; and in actions by and against executors, where there are mutual debts, are allowed with great reason. In 3 Binn. 135, the point was expressly made and decided, that a set-off or defalcation can be, and has uniformly been, made under our act of assembly, where one party is executor or administrator, and where the debts are in the same rights; that is, in a suit by an executor, the set-off must be a debt of the estate, and not the individual debt of the executor. And so, in a suit against him, the set-off must be a debt due the estate. And where the debt set off was due by the intestate in his lifetime, it must be set off, though there will be a deficiency of assets. But a person cannot buy a debt, after the death of the testator, and set it off; for it would disturb the course of distribution. So, a creditor of the estate cannot purchase at a vendue, and set off his debt, when there is an alleged or real deficiency of assets, for the same reason. 10 Serg. & Rawle, 10.

It was admitted here, the bond was for a debt due the testator; and the debt offered to be set off was due by the testator, in his lifetime. But it is said, in a suit against two, a debt due to one of them cannot be set off. It must be recollected, that in this case it was offered to be proved, that Crist, whose demand it was proposed to set off, was the real debtor in the bond, and Holdeman only his bail. This brings it within the case of Stewart, for the use of Salaignac v. Coulter and Day, 12 Serg. & Rawle, 252, and 445; and whether admitted as a legal or equitable set-off, I shall not inquire; but by that case it must be admitted.

The testimony as to what was said by the counsel at the trial, on a former bond, may be evidence, not to charge the plaintiffs, because I do not know that his admissions would be evidence for that purpose, but to show that the set-off was not then decided on, but left for decision in this case.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 W. 440; 8 W. 262; 9 W. & S. 108; 4 Barr, 33; 6 Barr, 39; 2 G. 78; 25 S. 136.

Cited by the Court, 7 S. 96.

[*124] *Case of a Road from the West End of Pomfret Street, Carlisle.

CERTIORARI.

The Court of Quarter Sessions, under the act of the 6th of April, 1802, have power to grant a re-review of a road, though two former sets of viewers have reported in favour of the road.

THE opinion of the court was delivered by

HUSTON, J.—*Certiorari* to remove the proceedings on the petition for a road from the west end of Pomfret Street, in the borough of Carlisle, and intersecting the Newville road, about one hundred perches east of John Higgin's house, at a small hill on the land late of John Creigh, Esq.

In this case, the petition was presented at November Sessions, 1825, and the court appointed viewers. Five of them reported in favour of a public road, in due form, to January Sessions, 1826, which was read and approved nisi. At April Sessions, 1826, a petition for a review was presented, and six reviewers appointed; who met, and four of them confirmed the former report, and at August Sessions, this was read and confirmed nisi. A petition was presented at November Sessions, 1826, for a re-review, which was held under advisement, until January Sessions, 1827, when the court appointed re-reviewers, who reported to April Sessions, that the road was unnecessary. This was read and confirmed nisi, and at August Sessions, 1827, confirmed.

The only error assigned was, that the court erred in granting a re-review, after the two first sets of viewers had reported in favour of a road.

By the act for laying out, making, and keeping in repair the roads and highways, &c., passed the 6th of April, 1802, it is directed, that the Courts of Quarter Sessions in the several counties of this commonwealth, on being petitioned to grant a view for a public or private road, shall have power, and by virtue of this act are directed and required, as often as they find it needful, in open court to appoint six discreet and reputable freeholders of the inhabitants near where the road is wanted. It proceeds to prescribe directions for these viewers, who are to make a report to the next Court of Quarter Sessions, and if then and there the justices of the said court shall approve of the same, it shall, at the next court after that to which the report is made, be entered on record, and thenceforth shall be taken, deemed, and allowed, to be a lawful public or private road, as

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the case may be. The court shall direct of what breadth the road shall be opened, which shall not in any case exceed fifty feet.

The 22d section authorizes and requires the appointment of a review, on application made for that purpose, at the expense of the petitioners, provided such application be made at the next Court of Quarter Sessions, after report has been made on the first view.

*There is no provision in this, or any other act of assembly, expressly on the subject of a re-review; but [*125] it has long been the custom, to grant a re-review under a former act of assembly, containing, as to this matter, the same provisions as that now in force, 2 Yeates, 63, and under this act, 2 Binn. 256. That, however, has been usually done where the viewers and reviewers have differed in their reports.

The law directing a review, supposes it possible, that six discreet and reputable freeholders may be mistaken, or it would not have directed the review. Although it is not probable, yet it is possible, that the six appointed to review may also, from prejudice, or passion, or some other cause, commit an error, or fall into a mistake.

It has happened, that a great ferment was excited on the subject of a short road, and one really of not much importance to the public, or any individual; and the legislature would seem to be aware of this, when they require the report to be approved by the court, to lie over for a term, a review to be then granted, if required; and, by the fair meaning, and settled construction, the decision of the court after this, before a road is legally established.

Some zeal was apparent in the discussion of this case; and something said, of the danger of permitting a court to decide contrary to the reports of two views. The same, and much more of such objection, is occasionally heard, to granting new trials; but the courts have a right, and when it is exercised, the community has no cause to complain, and does not complain. In the case before us, the power is expressly given; for I will not suppose, that the legislature meant that it must be approved, when they use the phrase, "and if then and there the justices of the said court shall approve of the same." As the court could then have refused to approve of, or to confirm the first two reports, it was matter of discretion, whether they should inquire by another view, or act on what was before them; and it was no more the subject of a writ of error, than granting or refusing a new trial.

I have known several instances, of the court refusing to approve, of the first report; and several of their refusing to

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approve where viewers and reviewers have concurred, and no harm done. Something must be left to the sound discretion of every court. We have no means of deciding on the propriety of the exercise of that discretion, in most cases; at least not such information as would be called infallible. We think it best to leave it where the law has placed it; and feel confident courts will seldom refuse to approve of reports without good reasons.

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*[CHAMBERSBURG, OCTOBER 20, 1828]

Hoeflick against Snyder.

IN ERROR.

The borough of Chambersburg, under a power given by the act of assembly to assess, apportion, and appropriate such taxes as shall be determined by a majority of them, necessary for carrying their rules and ordinances into complete effect, provided, no tax shall be laid in any one year, on the valuation of taxable property, exceeding one cent in the dollar, has power to assess single men, without property, inhabitants of the borough.

ERROR to the Court of Common Pleas of *Franklin* county, in an action of trespass. The plaintiff in error was defendant below.

In the court below the following facts were admitted, and were to be considered as if found by special verdict, and the judgment thereon to be subject to revision, by writ of error.

The town of Chambersburg was incorporated as a borough, by act of assembly, passed the 21st of March, 1803. The above law was revived by the act of the 11th of March, 1815. Frederick Smith, William S. Davis, John Radebaugh, Jacob Heart, and George Brown, were duly elected town council of the borough of Chambersburg, on the first day of May, 1826, and sworn into office on the fifth of the same month. A tax was assessed by the said council, on the 16th day of May, 1826, and Paul Hoeflick, the defendant, was appointed collector of the same; into whose hands, a duplicate thereof was placed and delivered on the 23d of May, 1826, in which Nicholas Snyder, the plaintiff, a single man, and an inhabitant of the borough, without property, was assessed the sum of fifty cents.

Paul Hoeflick, the defendant, by virtue of the warrant, annexed to the said duplicate, signed by Edward Crawford, burgess of the said borough; and by virtue of a warrant, dated the 15th of May, 1827, and signed by John Findlay, burgess of the said borough, on the 16th of May, 1827, entered the store of N.

[Hoefflick v. Snyder.]

Snyder, the plaintiff, and forcibly and against his consent, took therefrom, and out of his the said Nicholas's possession, a pair of leather calf-skin boots, of the value of eight dollars, the property of the said Nicholas; and this is the trespass complained of.

If the judgment should be in favour of the plaintiff, the damages are to be ascertained by three men, to be appointed by the court.

The court below entered judgment for the plaintiff.

By the act of assembly of the 21st of March, 1803, section 6, it was enacted, "That it shall and may be lawful for the town council, to meet as often as occasion may require, and enact such by-laws, and make such rules, regulations, and ordinances, as shall be determined by a majority of them necessary to promote the peace, good order, benefit, and advantage of the said borough; particularly, *of providing for the regulation [*127] of the market, streets, alleys, and highways therein. They shall have power to assess, apportion and appropriate, such taxes as shall be determined by a majority of them necessary, for carrying the said rules and ordinances from time to time into complete effect; and also, to appoint a town clerk, treasurer, two persons to act as street and road commissioners, and a clerk of the market, annually, and such other officers as may be deemed necessary, from time to time: *Provided*, That no by-law, rule, or ordinance of the said corporation, shall be repugnant to the constitution or laws of the United States, or of this commonwealth; and that no person shall be punished for a breach of a by-law or ordinance, made as aforesaid, until three weeks have expired after the promulgation thereof, by at least four advertisements, set up in the most public places in the said borough: *And provided also*, That no tax shall be laid in any one year, on the valuation of taxable property, exceeding one cent in the dollar, unless some object of general utility shall be thought necessary; in which case a majority of the freeholders of the said borough, by writing, under their hands, shall approve of, and certify the same to the town council, who shall proceed to assess the same accordingly."

M' Cullough, for the plaintiff in error.—The power to tax is general. Every person entitled to vote for borough officers, is bound to contribute in some way. The qualification is, "Entitled to vote for members of the legislature, who have resided twelve months in the borough." Section second of the act of incorporation of 1803. One who has no property, can contribute only by a poll tax. An appeal for an unreasonable tax is given to the Quarter Sessions. Property is not the exclusive

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subject of taxation. No restriction to property is contained in the act of incorporation.

Crawford, contra.—Young men are migratory ; and on the principle contended for, may be taxed in different towns in the same year. The limitation on taxation, is in reference to property, and the power must be supposed to have been given in reference to property. Here, if they can tax the person, there is no limitation. No power exists to tax, but what is expressly given. *Piper v. Singer*, 4 Serg. & Rawle, 354.

The opinion of the court (TOD, J., dissenting,) was delivered by

GIBSON, C. J.—A power to tax ought to rest on something more substantial than implication. But the town council has express power “to assess, apportion, and appropriate such taxes as shall be determined by a majority of them,” to be necessary for carrying their ordinances into effect ; and this with no restriction, or limitation, but that the tax shall not exceed a cent on the dollar. It has been said, the nature of the power is indicated by the nature of the limitation, which has regard to property exclusively. But it by no means follows, that the legislature had nothing in view but the subject of the power, as indicated by the limitation ; for the act of *assembly of [*128] 1799, in which are enumerated the subjects of taxation for county purposes, and subject to a like limitation, contains also, an express power to tax the person of every single freeman. There is nothing in the nature of taxation, which necessarily restricts it to property ; and, where it is exercised for particular purposes, under a grant which contains no enumeration of its objects, the enumeration in the act of assembly of 1799, being a general law, must be assumed as the basis of the grant, which otherwise would be without bound or limit. As regards this corporation, there is a peculiar fitness in this ; because, taxation being the basis of our elective franchise, and the corporate qualifications of the electors being declared to be the same as those of the electors of members of the general assembly, the legislature would seem to have indicated, that each should be respectively subject to the same rule and measure of assessment. Here, then, the plaintiff below was assessed as a single freeman, without assessing his property or profession ; and it, therefore, seems the corporation did not transcend its powers.

Judgment reversed, and judgment for the defendant.

[CHAMBERSBURG, OCTOBER 20, 1828.]

Fleming *against* Beaver.

IN ERROR.

H. and M. were sureties for P., and M. paid half the debt, and joined H. in confessing a judgment to a creditor of P.'s for the other half, it being agreed H. should pay this judgment. M., however, was compelled to pay it: held, that H.'s land being sold, by execution, M. had a right to come on the fund in the sheriff's hands, in preference to a subsequent judgment creditor of H.

Actual payment discharges a judgment at law; but in equity, it may still subsist if the justice of the case requires it.

An equitable right to such judgment may exist without any actual assignment of it.

IN the Court of Common Pleas of *Franklin* county, to which this writ of error was directed, the following case was stated, for the opinion of the court. The plaintiff in error was defendant below:—

In the year 1818, James Walker held two judgments, amounting to about six hundred dollars; one entered to November Term, 1817, No. 113, and the other to the same term, No. 114, against a certain George Pennell, who was the owner of a certain house and lot in Greencastle. Pennell sold and conveyed the house and lot to Henry Guiger, for a sum more than sufficient to discharge the incumbrances, payable in three or four annual instalments; but Guiger being apprehensive that the incumbrancers *might press their liens against the house and lot, before sufficient of the purchase-money owing to Pennell [*129] by Guiger, would become due, required that he should be indemnified against such an event. It was likewise part of the agreement between Pennell and Guiger, that the purchase-money should be applied, as it became due, to the discharge of the liens of which the parties mentioned were aware; and at the same time, Pennell entered into a bond with Isaac Hartman, deceased, (of whom Thomas M'Cauley subsequently became administrator,) and Peter Hawbucker, as his sureties to Henry Guiger, conditioned to indemnify Guiger against incumbrances. After some time, Walker being about to proceed against the property on his judgments, Thomas M'Cauley, as representative of Isaac Hartman, who was then dead, paid him the sum of three hundred and seventy-six dollars and eighteen cents, and discharged the balance due to Walker in the following manner: Walker was indebted to a certain Henry Finfrock in a certain judgment to January Term, 1818, No. 140, and which had been subsequently

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revived by a *scire facias*, amounting to two hundred and forty-two dollars and seventy-two cents. For this sum Thomas M'Cauley, Peter Hawbucker, and James Walker, confessed judgment to Henry Finfrock at November Term, 1820, No. 182, which it was agreed, amongst the defendants thereto, was to be paid by Hawbucker. This judgment was entered on the 4th of December, 1820, and revived by *scire facias* to April Term, 1823, upon which judgment was entered, and a *fiery facias* issued thereon to November Term, 1823, upon which the goods of Thomas M'Cauley were levied. This judgment was to be recovered for the use of the M'Kean administrators. On the 29th of December, 1823, Thomas M'Cauley paid to A. J. Findlay, their attorney, the balance due on the execution, to the amount of two hundred and seventy-nine dollars and eighty-nine cents, and the execution was indorsed, "plaintiff satisfied, A. J. Findlay, attorney of the plaintiff."

The following entry was also made on the execution docket :—

"Received the 29th of December, 1823, of Thomas M'Cauley, satisfaction in full of debt, interest, and attorney's fee; and by order of Peter Hawbucker filed, this judgment and execution are to stand against him, the said Hawbucker, for the use of the said M'Cauley.

"A. J. FINDLAY, attorney of the plaintiff."

The bonds given by Guiger to Pennell as the consideration of the purchase of the house and lot, were shortly after transferred by Pennell to other persons.

On a *venditioni exponas*, No. 73, April Term, 1824, at the suit of William Drucks, a house and lot of Peter Hawbucker were sold to John Beaver, on the ———, for the sum of five hundred and five dollars, which was paid over to the defendant, Archibald *Fleming, the then sheriff, to abide the [*130] question, whether the said judgment of Henry Finfrock was entitled to be paid out of the proceeds of the said sheriff's sale. John Beaver was the surviving partner of George Palsgrove, and claimed the money under the judgment stated below.

The following are the judgments against Peter Hawbucker :—

Henry Finfrock	}	Entered the 4th of December, 1820.
v.		Judgment for, \$279 83
Thomas M'Cauley,		Interest from the 12th of June,
Peter Hawbucker, and		1823,
James Walker.	}	Costs, 13 56½

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Waynesburg, Greencastle, and Mercersburg Turnpike	}	Entered the 22d of April, 1821.	
v. Peter Hawbucker.		Judgment, No. 313, Jan. 1811,	\$118 81
		Interest till 17th Jan. 1821,	04

118 85

Then paid, 18 25

100 65

Interest till sale, 19 66

Costs, 50

Commission, 2 40

123 16

Drucks	}	<i>Venditioni exponas</i> , No. 73, April Term, 1824.	
v. Hawbucker and M'Lanahan.		Costs of sale,	\$12 02
			123 16

505 00

135 18

135 18

369 72

6 69½

363 12½

John Beaver and	}	Entered on the 18th of April, 1821.	
George Palsgrove		Judgment, No. 226, April Term,	
v. Peter Hawbucker.		for	\$380.00
		Interest from the 17th of April, 1821,	
		Costs,50
		Commissions,	6.69½

*If the court, on the above statement of facts, should be of opinion, that Thomas M'Cauley is entitled to be [*131] paid the amount of the judgment in favour of Henry Finfrock, and to stand in his place, judgment is to be entered for the defendant; and, if they should be of opinion that he is not, then judgment to be entered for the plaintiff, for three hundred and sixty-three dollars and nineteen and a half cents.

The court below gave judgment for the plaintiff.

Dunlop, for the plaintiff in error.

Findlay contra.

[Fleming v. Beaver.]

The opinion of the court (TOD, J., dissenting, and HUSTON, J. and SMITH, J., being absent at the argument, and taking no part in the cause,) was delivered by

GIBSON, C. J.—The substance of this obscurely stated case is this: Pennell sold a house and lot to Guiger, and together with Hawbucker and Hartman, (since dead, and represented by M'Cauley,) executed a bond, with condition, that the incumbrances should not be pressed faster than the purchase-money should grow due, to discharge them. Walker, a judgment creditor, being about to proceed, M'Cauley paid him in cash rather more than half the amount of the bond of indemnity to Guiger, and the residue thus:—Finfrock had a judgment against Walker; in satisfaction of which, Hawbucker, M'Cauley, and Walker, confessed a judgment to Finfrock, which, it was agreed by the parties, should be paid by Hawbucker, but which was levied on the goods of M'Cauley, and paid by him. Hawbucker's house and lot being sold on a judgment at the suit of Drucks, the question is, whether M'Cauley shall come on the fund in the hands of the sheriff, as a judgment creditor under Finfrock; or, whether it shall be paid to Beaver, a subsequent judgment creditor.

It is clear, that Hawbucker and M'Cauley stand in the relation of principal and surety; and a surety who has paid the debt, is entitled to be substituted for the creditor. But a subsequent creditor, whose fund has been taken away by a prior creditor, is also entitled to be substituted. Hence, an argument, that in the case at bar, there is but equity against equity, and that the parties are to be left to their legal advantages. The parties are the principal, the surety, and the subsequent incumbrancers. But the judgment creditor had not a second fund in the hands of the surety; and even if he had, it is not easy to imagine on what principle of justice the surety would be bound to pay the debt in ease of the principal, and for the benefit of a subsequent incumbrancer. Surety was not demanded for the benefit of any but those who were parties to the contract; and, the advantages incident to it, necessarily belong only to themselves. The right of the surety to be substituted in the first place, is indisputable; and the question stands exactly as if the prior creditor himself were pressing his claim on this fund, [*132] without having pursued the surety to insolvency. That would not be required of him. The surety contracted on the credit of this very fund; and being prior in time, he is prior in right to a creditor who has acquired a claim on it subsequently. If such creditor could compel the surety to pay the prior debt, the effect would be precisely the same as if the principal had paid it, and the surety were compelled to pay the

[Fleming v. Beaver.]

subsequent creditor; for as both debts would be satisfied, it could be of no consequence to the surety, whether his money were applied to the one debt or the other: and thus, it is obvious, his responsibility might be kept alive after the extinction of the debt for which alone it was pledged. That cannot be done.

Actual payment discharges a judgment at law, but not in equity, if justice require the parties in interest to be restrained from alleging it, or insisting on their legal rights. *Kuhn v. North*, 10 Serg. & Rawle, 399, was the case of a voluntary payment of the debt of another, which, so far from creating an interest in the judgment to affect subsequent creditors, would not have sustained an action of *indebitatus assumpsit* against the debtor. There is an obvious difference between one who has voluntarily paid the debt of another, and one who has paid on compulsion, from having become surety at the instance of the debtor, which gives an equity, not only against the latter, but against every one else deriving title from him subsequently to the contract of suretyship.

As to the supposed inefficacy of the substitution attempted by the parties, and the alleged inability of this court to compel the creditor to assign the judgment, it is sufficient to remark, that an actual assignment is unnecessary. The right of substitution is everything, and actual substitution nothing. By a fiction, to which we are indebted for nearly all our equitable jurisdiction, the law has made the assignment already; and hence, the right of the party entitled, by no means depends on the willingness of the creditor to transfer the security. Here there is a clear right of substitution; and the surety having paid the debt, succeeds by operation of law to the rights of the creditor.

Judgment reversed, and judgment for the defendant.

Cited by Counsel, 2 W. 206, 230; 8 W. 274; 10 W. 150; 1 W. & S. 157, 410; 3 W. & S. 403; 8 W. & S. 451; 9 W. & S. 39; 6 Barr, 77, 504; 7 Barr, 389; 8 H. 44; 11 H. 295; 11 C. 118; 13 Wright, 25; 2 S. 467; 6 S. 79; 6 N. 445; 7 N. 174; s. c. 6 W. N. C. 269; 9 N. 429; 10 N. 166; 2 O. 437; 9 W. N. C. 271; 10 W. N. C. 9; 12 W. N. C. 9.

Commented on, in 6 W. & S. 198; and approved, in 1 Barr, 516; and also in 10 Barr, 522.

Cited by the Court, 3 Penn. R. 62; 9 W. 455; 4 W. & S. 94; 9 Barr, 499; 1 J. 48, 332, 532; 1 H. 286; 7 Wright, 519; 1 N. 82, 83; s. c. 2 W. N. C. 668; 15 N. 484.

As was tersely said by Chief Justice GIBSON in the principal case: "The right of substitution is everything, and actual substitution nothing." It is therefore immaterial whether there be any formal decree of subrogation: 15 N. 484. The fact that the instrument or record on which subrogation is claimed is marked cancelled, paid, or satisfied, is immaterial, since, indeed, it has to be paid to the original creditor before the right of substitution can arise: 1 N. 83. Where, however, an actual decree of subrogation is asked for, the party wishing to have it reviewed in the Supreme Court must *appeal*, a writ of error is not proper practice: 7 Wr. 518.

[*133]

*[CHAMBERSBURG, OCTOBER 20, 1828.]

Wright and Wife *against* Brotherton and Another.

IN ERROR.

Testator directs, that "the legacy coming to my daughter E., intermarried unto B. K., shall be lent out on interest, to support the said E. during her life; and after her death, if she die leaving no lawful children, her share, what is left, shall be equally divided amongst my children. And I do further order and bequeath unto my son-in-law B. K., the sum of five pounds, which shall be his share in full out of my estate. And it is further my will, and I do order, that the legacy coming unto my daughter M., intermarried unto J. W., shall be put out on interest for the support for her natural life, and after her death, if she dies without lawful heirs, shall be equally divided amongst my children, what is left. And I bequeath unto my son-in-law, J. W., the sum of five pounds, which shall be his share in full." Held, that the legacy coming to M. under this part of the will, on the death of E., is subject to the direction of the testator, to have it put out at interest, &c.

ERROR to the Court of Common Pleas of *Franklin* county.

Chambers, for the plaintiffs in error.

M' Cullough, *contra*.

The opinion of the court was delivered by

SMITH, J.—The plaintiffs claim, by and under the will of Conrad Fishburn, deceased, who, after having made his will, died in 1800, leaving six children, namely, Philip, Frederick, Conrad, Elizabeth, married to Benjamin Koony, Mary, married to John Wright, the now plaintiff, and Barbara. After the death of the testator, Elizabeth Koony died, without issue. The principal point in this case, arises on the following clauses in the said will, to wit:

"The legacy coming to my daughter Elizabeth, intermarried unto Benjamin Koony, shall be lent out on interest to support the said Elizabeth during her life; and after her death, if she die leaving no lawful children, her share, what is left, shall be equally divided amongst my children. And I further order and bequeath unto my son-in-law, Benjamin Koony, the sum of five pounds, which shall be his share in full, out of my estate. And it is further my will, and I do order, that the legacy coming unto my daughter Mary, intermarried unto John Wright, shall be put out on interest for the support for her natural life, and after her death, if she dies without lawful heirs, shall be equally divided amongst my children, what is left. And I bequeath unto my son-in-law, John Wright, the sum of five pounds, which shall be his share in full."

[Wright and Wife v. Brotherton and another.]

The question, made in this case, resolves itself into a question of intention, and is, whether the legacy, coming to Mary, under this part of the will, on the death of Elizabeth, vests in her absolutely, or whether it is subject to the direction of the testator, to have it put out on interest for her support during her life, and then to be *divided among the children of the testator? [*134] At this time of day, it is certainly indisputable, that the intention of a testator, expressed in his will, and fairly drawn from it, must govern the construction of it; it is the pole star in every will, and ought to be firmly adhered to, where it can be satisfactorily discovered. Courts of justice always endeavour to find out the intention of a testator, and to effectuate every provision intended by him, if not contrary to established rules of law. In our endeavours to ascertain the intention of a will, we must take the whole of it together, not detached passages; "its four corners," (as a late learned judge of this court, expressed himself,) "must be examined, and the true meaning of the testator, even spelt out by little hints." The words of a will, are to be taken according to their common use, and the common language of the country, and effect is to be given to every word. If parts of a will should appear to be inconsistent with each other, it is the duty of a court to reconcile them, if that can be, without doing violence to other parts of it, and if it be in accordance with the general intent of it; for no part of a will ought to be lost, or rejected, unless it be absolutely necessary. This will appears to be one, in which a father intended to provide for his children: in many parts of it he speaks of "his children." After a legacy to his wife, he directs, that what remains after his decease, shall be equally divided "among his children;" and, that "his children" shall be paid share and share alike. Indeed, all his children appear to have had hold on his affections, and to have been the sole objects of his bounty and care, and no other persons. In that part of his will, in which the testator orders Elizabeth's legacy, after her death, without issue, to be equally divided among his children, there is not, in my opinion, any circumstance to lead the mind to suppose, that he intended to use the word "legacy," in a sense different from that applied to it in other parts of the will; and, after an attentive consideration of this part of the will, I have come to the conclusion, that the testator intended, all that part of his estate, which Elizabeth took by the same, should be divided at her death, without issue on her part, among his other children; for, it appears to me, he used the terms "legacy" and "share," as synonymous; and the sentences, restricting the interest of Elizabeth to a life estate, and giving at the same time, to her husband, a legacy of five pounds, declaring it to be his

[Wright and Wife v. Brotherton and another.]

share in full out of his estate; and in that part, relative to Mary's share, in which he gives a legacy to her husband, John Wright, of five pounds, declaring, it shall be his share in full, go to show, that his intention was, that his children alone should have his estate. It is evident that the testator thought of, and well knew, the connection in which John Wright and Benjamin Koony, his sons-in-law, stood to him; and must have had in his mind, what they might be entitled to of his property, by reason of that connection. The legacy of five pounds to each, was so small a sum, as to show clearly, that it was not intended as a real benefit, but that the testator must have [*135] *had something more, or some other object in view. No doubt, he was aware, if he did not by his will guard against it, the share, or money, coming to his daughters, might go to their husbands, in case the daughters died without issue, and pass to their representatives, who might be strangers to him. I think, he did guard against this. The giving of the small legacies of five pounds to each son-in-law, with a declaration, that these legacies should be in full of their share out of his estate, satisfies me, that the intent of the testator was, that neither of them should, under the will, receive any part of his estate, beyond the amount of the legacy given to each. I confess, at first, on reading the will, I thought, the provision in it, in case his son Frederick should die, his share should go to his children, stood in the way of the construction I have given to this part of the will; but, on more mature reflection, I do not think so. Possibly, the testator may have heard something of lapsed legacies on the death of legatees, in the lifetime of the testator, against which he may have been desirous to guard, and, therefore, expressed himself in this part of the will in this way. In this particular part of the will, the words are general, and may as well apply to the death of Frederick before the testator, as to any other time; and hence it is, that I think this clause of survivorship may have been intended to prevent a lapse, and, therefore, ought not to have any effect on constructing the other parts of the will, from which it appears plainly to have been the intention of the testator, that all his children should have equal shares in the legacy left to his daughter Elizabeth, in case of her death without issue. If then, the plaintiffs were now permitted to recover the whole of the one-fifth part of the share, which came to Elizabeth, the plain intention of the testator would be destroyed, which was to bestow his estate and property to and among his children, and to preserve the same, as long as possible to them, and them only. The case of *Vickell v. Breton et al.*, 1 Bro: Parl. Rep. 167, resembles the present case in some particulars. There Thomas

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Breton, by his will, ordered his executors to pay Penelope, whom he called a daughter of his wife, ten shillings, and no more; and to William, the son of his wife, ten shillings, and no more. He did not dispose of the residue of his personal property. The above-named two children, whom he would not acknowledge to be his legitimate children, brought a bill, among other things, to have the residue distributed to them, according to the statute of distribution. The chancellor decreed for them; and the reason assigned was, that the words of exclusion, were not clearly expressed, and should be taken strictly. This decree was appealed from, and was afterwards reversed in the House of Lords, so far as related to these two children; and they were excluded from any participation in the residue of the estate, because the testator had signified his intention in his will, that they should have no more than ten shillings. I am aware of the case of *Byrne v. Byrne's Executors*, 3 Serg. & Rawle, 54, where, the testator having *bequeathed to his son five [*136] hundred dollars, and no more, it was held, that these words did not necessarily imply an intention, that he should have no other claim on the estate; but that case was decided under particular circumstances, not applicable to the case now under consideration. In this case, the claim of the plaintiffs arises under the will, and the question is not, whether Mary shall be denied the enjoyment of any property bestowed on her in the will of her father, but what estate does she take under it? It is the opinion of this court, that she takes a life estate in the legacy in question, and no more; and that, therefore, the judgment should be affirmed.

Judgment affirmed.

Cited by Counsel, 7 W. & S. 286; 2 S. 278.

[CHAMBERSBURG, OCTOBER 20, 1828.]

Eckert and Another *against* Yous' Administrator.

CERTIORARI.

A husband may petition the Orphans' Court in right of his wife, for the partition or valuation of his wife's estate, where her father dies intestate.

Certiorari to the Orphans' Court of *Franklin* county, to remove the proceedings and decree, in the case of the sale of a certain part of John Yous' real estate.

Crawford, for the appellant.*Chambers, contra.*

[Eckert and another v. Yous' Administrator.]

The opinion of the court was delivered by

SMITH, J.—This is an appeal from a decree of the Orphans' Court of Franklin county, confirming the sale of a part of the real estate of John Yous, deceased, made by his administrator, by an order of the said court. It appears, that on the 18th of August, 1823, Solomon Eckert, one of the appellants, and who married Catharine, one of the daughters and heirs of John Yous, deceased, presented a petition to the Orphans' Court of Franklin county, in which he stated, that he was desirous of having his share, in right of his wife, in the real estate of the said John Yous, deceased, in severalty; and, therefore, prayed the said court, to award an inquest to make partition of the real estate aforesaid, to, and among all the heirs of the deceased, if the same could be so done; or, to value and appraise the same, according to law. On this petition, an inquest was awarded, and on the 9th of December, 1823, an inquisition was taken, and the estate divided into five parts. On the 19th of January, 1824, the court approved and confirmed the inquisition; and, at the instance of the said Solomon Eckert, granted a rule on all the heirs of John Yous, deceased, to appear at the next Orphans' *Court, to be held on the second Tuesday of [*137] March, 1824, to accept or refuse the estate, at the appraisement. On the 9th of March, 1824, John Yous, a son of the deceased, appeared, and testified his desire to take part, No. 3, at the valuation thereof made. The court thereupon, adjudged the same to him, on his entering into recognisances for the payment of the respective shares of the widow and other heirs of the deceased. The requisite recognisances were duly entered into, either on the same day, or very soon after, by John Yous, to Solomon Eckert and John Ebert, in right of their respective wives, and to the other heirs, to pay them their shares of the lands, so as aforesaid adjudged to him; and on the 17th January, 1825, Solomon Eckert and John Ebert acknowledged, on the records of the Orphans' Court, to have received satisfaction in full of the first part of their recognisances. On the same 9th day of March, 1824, when part, No. 3, was accepted by, and adjudged to, the son, John Yous, Solomon Eckert, in right of his wife, Catharine, John Ebert, in right of his wife, Elizabeth, and all the remaining heirs, appeared in court, and refused to take any part of the real estate at the valuation thereof, and desired, that the same might be sold; and, on the 19th of April, 1824, the court decreed the sale to be made on the usual terms. Afterwards, on the 10th of January, 1825, John Yous, the administrator, reported to the court, that he had made sale of part, No. 5, to George Beek. This return, or report of the administrator, was continued from time to time; but

[Eckert and another v. Yous' Administrator.]

on the 9th of March, 1825, was, on motion, confirmed by the court.

This statement of facts, brings up one point only for consideration, which is, can the husband conduct the proceedings in the Orphans' Court, for the partition or valuation of the estate of his wife's father, who died intestate, without her joining or participating in the proceedings? It appears most satisfactorily, that these proceedings in the Orphans' Court, originated with, and the successive steps in the same, were taken by Solomon Eckert, the son-in-law of John Yous, deceased, and that he and John Ebert, now wish to have the last mentioned decree of the Orphans' Court reversed, although they have received a part of the amount of their wives' share from John Yous, under these very proceedings, and so far rendered them valid by their ratification. The objection then, which has for its object to reverse a part of the proceedings of the Orphans' Court, so far as the same relate to purpart, No. 5, or the sale thereof to George Beck, comes with a bad grace from Eckert and Ebert, the appellants, who wish this land to be resold. Besides, it is not, in my opinion, for the husband, after an acceptance of a recognisance from one of the heirs to himself, for a part of the land, and receiving payment by virtue of it, and thus clearly ratifying a part of the proceedings, to come into this court, and ask a part of the same proceedings, relative to another part of the estate, to be set aside, when he originated and conducted the whole proceeding. Be that, however, as it may, the broad question presents itself, could Solomon *Eckert alone, petition [*138] the Orphans' Court, in the manner, and for the purpose stated? We think he could, and that such has been the received opinion, on this subject, in every county in the state. The husband may be considered as the legal guardian and protector of his wife, and clearly, has an interest in her estate, as long as he lives, in right of his wife; and if he survive her, he would, provided there has been issue, &c., be tenant by the curtesy, in such an estate. In the case before us, the husband petitioned in right of his wife, and although (as was well observed on a former occasion, by a late judge of this court,) the wife, with all the forms required by law in the disposition of her lands, is perhaps too much under the power of her husband; and, instead of weakening, it were better, if possible, to strengthen her right; yet, when a practice, as in the case before us, for a husband to petition in right of his wife, has existed so long, and indeed, unbroken, and so much property is held under it, we think it ought not now to be disturbed. In the case of *Stoolfoos v. Jenkins and Wife*, 8 Serg. & Rawle, 167, the right of the husband to petition the Orphans' Court, for the appraisalment of his wife's real es-

[Eckert and another v. Yous' Administrator.]

tate, seems to have been strongly recognised. In that case, the question now under consideration, formed one of the exceptions submitted to the court for decision, by the counsel for the defendants in error, who contended, that the proceedings in the Orphans' Court were void; because the wife, who was principally interested, had not joined the husband in the petition, and was no party to the measure. But, in this, the court did not sustain them. Indeed, there is no adjudged case in Pennsylvania, that I know of which militates against the practice, or right of the husband to petition the Orphans' Court, in right of his wife, for the partition, or valuation of his wife's estate, where her father dies intestate; but there are several cases which strongly support it. And I therefore, think, the decree of the Orphans' Court, confirming the sale of purpart, No. 5, to George Beck, ought to be affirmed.

Judgment affirmed.

Cited by Counsel, 8 W. & S. 119; and by the Court, 1 Ash. 370.

Cited by the Court, 27 S. 313.

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*[CHAMBERSBURG, OCTOBER 20, 1828.]

Benjamin Keyser and Others, Commissioners of the County of Franklin, *against* William M'Kissan.

Same *against* John Brotherton.—Same *against* Robert Bratton.—Same *against* John Snyder.

APPEAL.

The commissioners of a county, as well as the treasurer, are bound to take an oath of office.

It is no defence for a treasurer, in a suit by the commissioners on his official bond, that the commissioners have not taken an oath of office.

The acts of public officers *de facto*, coming in by colour of title, are good so far as respects the public, but void when for their own benefit.

A payment to a county treasurer, who has not taken the oath of office, by his predecessor, is a legal payment.

Dunlop and *M' Cullough*, for the defendants.

Crawford and *Chambers*, *contra*.

The opinion of the court was delivered by

ROGERS, J.—This is an appeal from the decision of Justice Huston, at a Circuit Court held for the county of *Franklin*. The defendants move the court for a new trial, on the ground of a misdirection: 1. In instructing the jury, that the issue,

[Benjamin Keyser and others, Commissioners of the County of Franklin, v. William M'Kissan.]

whether Benjamin Keyser and Jacob Wonderlich, had taken the oath of office was an immaterial issue. 2. That the verdict was against law and evidence; and, 3. Because the court instructed the jury, that the plaintiffs, as commissioners, could maintain this action, without having taken the oath of office, required by the constitution of Pennsylvania. It is unnecessary to consider the first reason assigned; as, if the defendants fail in their second and third, it will be conclusive against the application.

These were suits brought by Benjamin Keyser and others, commissioners of the county of Franklin, against the treasurer of the county and his sureties, on the official bond, taken in pursuance of the directions of the thirteenth section of the act of assembly of the 11th of April, 1799. It is objected, that the plaintiffs, who are the commissioners, and from whom the treasurer received his appointment, had not taken the oath to support the constitution; and it is strenuously contended, that this omission renders the bond void. After the decision of the court in *Riddle v. The County of Bedford*, we consider the oath necessary, as well in the case of the commissioners, as the treasurer. The cases are not distinguishable in principle. It must also be conceded, as the matter now stands, that the oaths were not, in fact, taken by the commissioners. The [*140] *rule which governs the case is, that the commissioners, who appointed the treasurer, were officers *de facto*, since they came into their office, by colour of title. It is a well-settled principle of law, that the acts of such persons are valid when they concern the public, or the rights of third persons, who have an interest in the act done. *The People v. Collins*, 7 Johns. Rep. 554; *King v. Lysle*, Andrew's Rep. 163. And this rule has been adopted to prevent a failure of justice. And the distinction between the public, strangers, and the officer himself, is recognised in *Riddle v. The County of Bedford*, 7 Serg. & Rawle, 386. "A county treasurer," says the court, "is an officer within the 8th article of the constitution, and must take an oath of office, and he cannot sustain a suit to recover his fees as such officer, when he has not taken the oath, and there is no acquiescence in the defendant." In *Riddle v. The County of Bedford*, the plaintiff, who was the treasurer, was defeated, on the ground that the suit was brought for the benefit of the officer, who had omitted to qualify himself, by taking the necessary oath. If suit had been brought for the use of the public, it may be collected from the whole reasoning of the learned judge who delivered the opinion of the court, the result would have been different. The reason given for the rule is most satisfactory;

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"That the act of an officer *de facto*, where it is for his own benefit, is void; because, he shall not take advantage of his own want of title, which he must be conscious of: but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good." Cro. Eliz. 699; King v. Lysle, Andrew's Rep. 163; Hipsly v. Tucke, 2 Lev. 184.

That the commissioners, who appointed the treasurer, were officers *de facto*, is certain, as they possessed every qualification of officers *de jure*, except in the one particular, that they had omitted taking the oath prescribed by the constitution. They had at least colour of title. It is equally clear this suit is not brought for their own individual benefit, but for the use of the public; for breach of the defendant's official bond. This case is, then, embraced within all the rules settled in the various decisions cited from England, New York, and our own Reports.

An officer *de facto* may do such things as are for the good of the corporation. *Vide* King v. Lysle, Andrew's Rep. 163. A treasurer, to receive the county moneys, was indispensable. The commissioners had the power of appointing him, and as a consequence, of exacting security for the faithful performance of the trust. The greater includes the less. It is a defence, not entitled to much favour on the part of the treasurer and his sureties, that the appointment is void, and in this way to endeavour to excuse themselves from the performance of a contract, entered into with a full knowledge of all its legal consequences. Common honesty, and public policy, require that they should be estopped from such a defence.

[*141] *I do not observe, that the point was made in the Circuit Court, that the new treasurer of the county was not sworn, and that there was no person, before the commencement of the suit, to whom the defendant could legally pay over the money. This is not among the reasons for a new trial, and if it were, it would not, in the opinion of the court, avail the defendants. A payment to a treasurer *de facto*, who had colour of title, would have been good against the corporation. It is a mere pretence to avoid payment of the money which is justly due; and on a motion for a new trial, we will not turn the plaintiffs round on a technical objection, when it is manifest, the result of the second suit must be in favour of the plaintiffs.

We agree with the Circuit Court, that the verdict was according to law and the evidence; and, therefore, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

[Benjamin Keyser and others, Commissioners of the County of Franklin, v. William M'Kissan.]

Cited by Counsel, 6 Wh. 70; 4 W. & S. 425; 6 W. & S. 513; 6 Barr, 340; 15 N. 346.

Cited by the Court, 2 W. & S. 41; 5 C. 138; 5 S. 473.

[CHAMBERSBURG, OCTOBER 20, 1828.]

Lindsay *against* Scroggs.

IN ERROR.

A paper, found in the office of the deputy surveyor, proved to be in the handwriting of a former deputy surveyor, and purporting to be memoranda in relation to his official duty, concerning warrants, is good evidence.

WRIT of error to the Court of Common Pleas of *Franklin* county. The plaintiff in error was defendant below.

In the court below, it was an ejectment by Scroggs against Lindsay, for two hundred and eighty acres of land in Southampton township, Franklin county.

On the trial, in the court below, the plaintiff, who claimed under Samuel Blythe, gave in evidence two warrants, one dated the 17th of May, 1784, to John M'Connel; the other, dated the 3d of November, 1785, to Samuel Blythe, together with a survey by Matthew Henderson, deputy surveyor, in 1786. He then offered in evidence the following paper, proved to be in the handwriting of Matthew Henderson, who was deputy surveyor till his death, in 1795, or 1796, and produced by the present deputy surveyor, as found among the drafts in his office, together with the said survey:

"Memorandums for laying Samuel Blythe's warrants.—The survey of three hundred and eighty-four acres, first surveyed on warrant to B. Blythe, Jr., formerly certified, to be left as it is, taking off fifty acres of the north-west end, to be returned on warrant to *Daniel Key, the remainder to be returned [*142] on warrant to John Weeks.

"The survey of four hundred and sixteen acres, to be returned as it is, on a warrant to John M'Connel, and the warrant to Samuel Blythe, on which it was first surveyed, to be certified.

"The warrant to James Hall to be certified; two hundred and nine acres and fifty-eight perches of the land having been taken by an order of survey to Alexander Mitchell, dated January 23d, 1767, No. 2542, and fifty-six acres by a warrant to Samuel Rippely, dated the 20th of January, 1775, and one hundred and sixty-six acres and one hundred and forty-five

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perches, by a warrant to James Dunlop, dated the 11th of May, 1785, formerly surveyed and returned.

"The warrant to John Cullen to be certified; three hundred and ninety acres and ninety perches; the land having been surveyed, returned, and patented to John Reynolds, Esq., before the warrant came to hand, on the said Reynolds' warrants, dated the 14th of December, 1785, and 1st of February, 1787, respectively.

"The warrant to Ann Gordon to be certified; the land having been surveyed on James Cummins' two warrants, dated the 3d of February, 1738, and the 5th of January, 1786, respectively, and a warrant to William Walker, for four hundred acres, dated the 8th of September, 1776.

"Drew deed poll from B. Blythe, Jr., to Samuel Blythe, com. five shillings."

This evidence was objected to by the defendant, but admitted by the court, and exception taken by the defendant.

Crawford, for the plaintiff in error, contended, it was not a paper made in the course of official duty. The court had gone far enough already, and ought to restrain the admission of such papers. He referred to *Wilson v. Stoner*, 9 Serg. & Rawle, 39; *Blackburn v. Holliday*, 12 Serg. & Rawle, 140.

Chambers, contra, cited, 2 Binn. 55, where the surveyor wrote, that the land was in dispute, it was held evidence of ownership; *Boyles v. Johnstone's Executors*, 6 Binn. 125; *Evans v. Nar-gong*, 2 Binn. 55; *Galloway v. Ogle*, 2 Binn. 468. Slight evidence of ownership is sufficient. Entries of a surveyor at the time, are evidence of ownership. In *Wilson v. Stoner*, there was no authority, and therefore, all was void.

The opinion of the court was delivered by

GIBSON, C. J.—The presumption, that a warrant on location, is for the use of the person in whose name it was taken out, may be rebutted by slight evidence; and, on the other hand, a trust, presumed from the relation in which the person whose name is used, stands to another, may be rebutted by evidence equally slight—even by the reputation of the country. The ownership [*143] may be settled *by evidence that would be incompetent to settle anything else. The paper which is the subject of honest exception, purports to be a memorandum of instructions, received in a course of official duty, in relation to warrants in the hands of the deputy surveyor, as the property of Samuel Blythe; and, among the rest, one in the name of John M'Connel, on which, it would appear, the deputy had been in-

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structed to return a survey, made on a warrant in Blythe's own name. The rest relates to other warrants that were to be certified as unsatisfied, to entitle Blythe to the amount of the purchase-money in land office credits. The object, therefore, was, to prove that Blythe was the owner of the warrant in the name of M'Connel, under whom the defendant had pretended to claim. The acts of a deputy surveyor, preparatory to the consummation of his duty, such as his field notes, are unquestionably admissible as part of the *res gestæ*; and to prove them, it has been aptly said, even the sweepings of his office are evidence. In *Wilson v. Stoner*, the survey and indorsement in the handwriting of the deputy, were held void in the absence of proof of their having been made in pursuance of a previous authority; and they were deemed incompetent to prove the existence of such an authority, because, on the proof of that fact depended the question, whether they had been made in a course of official duty; and the admission of them to prove it, would have been an assumption of the question. Here there is no doubt of the existence of an authority to give the deputy cognizance; and as the noting of instructions was not only in the course of his duty, but necessary to a faithful discharge of it, the act was clearly of an official stamp; so that showing the footsteps of the parties, and having been found in the office of the deputy, after a period of forty years from his death, the paper was incontestably competent.

Judgment affirmed.

Cited by Counsel, 4 Barr, 130; 8 Barr, 438.

Cited by the Court, 3 H. 165, and 12 H. 346.

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[*144]

Galbreath and Others *against* Rife, Surviving Executor of Rife.

IN ERROR.

Testator devised all his property, real and personal, to his two sons, H. and D., subject to the payment of certain legacies, and made H. and D. executors. They filed an inventory, amounting to two thousand six hundred and thirty-one dollars and fourteen cents, and went into possession together of the property. H. sold some of the personal property; D., in less than a year, moved to the western country. There was no sale by D., and the principal part of the property remained after D.'s removal.

On an issue to try, whether part of the estate of the testator, amounting to ten thousand dollars, came into the hands of D., as surviving executor, and he was chargeable therewith, evidence on the part of the plaintiff, a legatee, is

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admissible to prove, that the defendant D., is a creditor of the estate of H., his co-executor, (now deceased,) and the debt accrued by the transfer of the estate of the testator to H. by D., and that he claims to be first paid out of the funds of the testator.

ERROR to the Court of Common Pleas of *Adams* county. The plaintiffs in error were plaintiffs below.

Fuller, for the plaintiffs in error.

Carothers, contra.

The opinion of the court (HUSTON, J., dissenting,) was delivered by

ROGERS, J.—This was an issue directed by the Orphans' Court of Adams county, to try, "whether part of the estate of Henry Rife, Sen., deceased, amounting to the sum of ten thousand dollars, lawful money, &c., came to, and was then in the hands of the said Daniel Rife, as surviving executor of the last will and testament of Henry Rife, Sen., deceased, and that the said Daniel Rife was, and is legally chargeable with the said sum of ten thousand dollars, lawful money, so received, as part of the estate of Henry Rife, Sen., deceased."

Henry Rife, Sen., made his will, in which he bequeathed all his property, real, personal, and mixed, to his two sons, Henry and Daniel, subject to the payment of certain sums, devised to his widow, and also subject to the payment of all his legacies, of which legatees, the plaintiff was one, and Henry and Daniel his executors. The executors proved the will, which was given in evidence, and also filed an inventory of the estate, amounting to two thousand six hundred and thirty-one dollars and fourteen cents. The plaintiff then proved, that Henry and Daniel went into possession of the property left by Henry Rife, Sen.: That Henry sold some of the personal estate, and that Daniel remained in the county of Adams; but that in less than a year, [*145] he removed to the western *country: That there was no public sale of the property, and no private sale by Daniel; and that the principal part of the old man's property was left after Daniel went away. They also proved, that Daniel and Henry held and used the property, one like the other, (in the language of the witness,) till Daniel moved away, just the same way they had done. The plaintiffs then offered to prove that the defendant is a creditor of the estate of Henry Rife, Jr., who is deceased, his co-executor: That the debt accrued by the transfer of the estate of Henry Rife, Sen., to Henry Rife, Jr., by the present defendant, and he claims to be first paid out of the funds of Henry Rife, Sen., deceased. This testimony being

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objected to, was overruled by the judge, and its rejection is now assigned for error.

Does this testimony tend to prove the issue between the parties? Henry Rife, Jr., it appears, in his lifetime, had settled his administration account in the Orphans' Court, in which he had charged himself with the whole amount of the personal estate of his deceased father. His co-executor, Daniel, was also cited to settle his account, who alleged, that he was not accountable as executor, because, he said, he had received no part of the estate, and was, therefore, not legally accountable for it; but that the whole estate had been received by Henry, who had settled his account and charged himself with it. It was to try these disputed facts that this issue was directed. It appears to me, that the evidence offered, was not only competent, but was evidence of the highest nature. It tends to prove, not only that Daniel had received part of the personal estate left to him by the will, but that he had exercised the highest right of ownership, by selling it to his brother Henry: That he had taken a judgment bond for the amount of the sale, and that he now claimed to be first paid out of the funds of the estate of Henry Rife, Sen. It has been urged, that the legatees have the estate of Henry bound for their claims; that it is fully solvent; and that they should first look to that for payment. It is denied that Henry's estate is solvent; but whether it be so or not is not material; because, if Daniel received part of this estate, as executor, he is bound to the legatees for the amount so received; and that is the very matter which this issue is directed to ascertain. The legatees have two securities for their claims, and they are not bound to look to one only. They may, if they choose, proceed against Daniel, and Daniel cannot shift the matter off himself, by saying, that although true it is, I received my share of the personal estate, yet I have disposed of it to my co-executor, and you must proceed against his estate for your claim. If Daniel has received part of the personal estate, which he afterwards sold, he is liable to the legatees for the amount so received. In the rejection of the testimony, we think there is error, and that the judgment be reversed, and a *venire facias de novo* awarded.

HUSTON, J.—The same parties were plaintiffs and defendants in the Court of Common Pleas and in this court. It was a case sent *by the Orphans' Court of Adams county; and the Court of Common Pleas, with appearance of reason, [*146] say, they can hardly see the object of the plaintiffs.

The facts proved were, that Henry Rife, Sen., made Henry Rife, Jr., and Daniel Rife the executors and devisees of his

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estate, real and personal, subject to certain legacies to a considerable amount. The executors made no vendue. The proof was, that Daniel never sold any of the property, or collected any debt; but, that Henry did not sell and collect money, and settled his account, charging himself with all the personal property. Daniel lived with Henry, and to all appearance, the property was in possession of both, until his removal to the western country, soon after his father's death, and he never sold or took any of it away. He was cited to settle his account, and attempted to be charged again with the whole of the personal property; and this issue was to ascertain whether he was liable. It was proved, that Henry had paid off a great part of the legacies, and there was no proof, that his estate (for he is dead,) was not sufficient to pay the remaining legatees, and the debts are all paid. It was under these circumstances the court said they could not see the object of the suit.

The defendants offered to prove, that Daniel sold his interest in the real and personal estate of his father to Henry, and that Henry had not, in his lifetime, paid the amount promised to Daniel; and that Daniel claims to be a creditor of Henry's estate, and be first paid out of the estate of Henry. The court rejected this evidence, and this is the error alleged. And the ground alleged is, that Daniel, selling his interest, had taken it into possession, and rendered himself liable.

I think the court right; because, Daniel sold as devisee, the part devised to him. It was not an act as executor, because it was proved, that Henry had paid a large part of the legacies, and has all the land yet; because it would be settling a matter between Daniel and Henry's representatives, and Henry's heirs were not before the court; and last, and not least, because finding Daniel liable for his personal estate, in this stage of the business, would be calculated to work manifest injustice, and, I am afraid, it is intended expressly for that purpose. Courts ought always to do justice, if possible, and our courts have equitable powers enough to prevent forms of law from producing plain unfairness.

By all on the record, and all the statements of the counsel, the real estate in the hands of Henry's representatives, is liable for these legacies, and from Henry's estate they ought to be paid. Why then, was not Henry's estate resorted to? Did his representatives procure the other legatees to institute this procedure to shield themselves and oppress Daniel? A court of equity would order an account to be taken, and the legacies to be paid out of Henry's estate, if solvent, and reserve the question as to Daniel's liability *for further order; but,

[*147] would never permit Daniel's estate to be sold to pay,

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and then turn him round to sue Henry's representatives. To be sure, the legacies have a preference, being a lien on the lands in the hands of Henry's heirs; and whether Daniel can recover anything, and what, is not trying here. I am alone in the opinion I give; and it is, I believe, because I view the facts in a different light from my brethren. I think I see them as they appeared to the judge who tried the cause; and as a general rule, he having a better opportunity, is more likely to have understood them correctly, than this court; for it has happened, that a cause was presented here in a point of view different from that exhibited below.

The facts are not fully before us. It seems young Henry filed an account of his administration, and charged himself with all the personal estate of his father. We know, too, that he paid off a great part of the legacies, and all the debts; but we are left to conjecture whether he applied the whole personal estate in paying debts and legacies. If he did, there is an end of the question; for if they are accounted for by one executor, that is all sense or law requires. No matter how many are bound to account; if one accounts, and has paid, the others are discharged. I repeat, I do not see the object of this suit, nor do I think they ought to have tried, or could try, the dispute between Daniel and Henry's heirs in this cause; and in that view of it, the court, as I think, rightly rejected the evidence.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Penn. R. 207.

[CHAMBERSBURG, OCTOBER 20, 1828.]

Sherfy against Fisher.

IN ERROR.

A constable is not liable to the plaintiff for not serving an execution issued by a justice, where the justice has gone to the constable and withdrawn it, in consequence of a *certiorari* delivered to him, though no bail was entered on taking out the *certiorari*.

WRIT of error to the Court of Common Pleas of *Franklin* county.

Sherfy was sued in this action for neglect of his duty as constable: and judgment was given against him in the court below on demurrer. Three executions in favour of Fisher, against one John Toms, had been issued by N. Wilson, Esq., a justice of the peace, and delivered by him to the defendant to be executed.

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The defendant had levied the executions upon the goods of Toms, [*148] but before any sale, Toms having sued out of the Court of Common Pleas three writs of *certiorari*, and served them upon Wilson, the justice, he, Wilson, called personally upon the defendant, and recalled, and withdrew the executions. No bail had been entered on taking out the writs of *certiorari*, and the levies were lost.

Dunlop, for the plaintiff in error, admitted that, by the rule of court, and the rule of law, the *certiorari* was no *supersedeas* in this particular case; yet the justice had authority to withdraw his executions. If an execution happens to be irregular, or illegal; if a mistake is made, a wrong sum or date is put in, or a blank left; or if the money is afterwards paid in full to the justice; or if a *certiorari* requires him to return the execution to court, in any of these cases he may stop the proceedings. The plaintiff generally trusts the business altogether to the justice. In practice the justice is very frequently called upon to withdraw an execution. In the fee bill he is expressly allowed a fee for a *supersedeas*. That he has authority to countermand his own orders is further shown by 1 Strange, 6, and 6 Bac. Ab. 409, 412.

G. Chambers, contra.—A *certiorari* is in the nature of a writ of error. The justice returns a copy of the judgment and execution. Even a writ of error is no *supersedeas* without bail. The sheriff is bound to go on. Execution is an entire thing; and once begun, it must be completed. The sheriff may sell after the return of his writ, and so may the constable. The writ is his authority, but it is not necessary he should have it always with him. If the rule of court requiring bail on a *certiorari*, to effect a *supersedeas*, is of any validity, it must be binding on the constable and justice both, and they must be held to take notice of it: otherwise the plaintiff may be exposed to any unfair combination between the two. Besides, here was only a taking up of the execution; nothing in the nature of a legal *supersedeas*. He cited, as in point, *Blanchard v. Myers*, 9 Johns. Rep. 66.

The opinion of the court was delivered by

TOD, J.—We are all of opinion that the constable is not liable. There is no allegation of bad faith, or of wilful default in him. The idea that a *certiorari* put a stop to all proceedings was probably a mistake of the justice. Having made a record of the delivery of the executions to the constable, it was his business also to make a record of taking them back again unexecuted

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It was in effect a *supersedeas*. He evidently intended to stop the executions. We need not inquire whether the constable was bound at his peril to decide on the point of law; for it does not appear that the reason for the countermand was made known to him. If the justice in any case had the power, then it would seem to follow that the obedience of the constable is excusable. At common law a mistaken order may be countermanded. In this commonwealth, it is believed, that after judgment is obtained, the justice usually carries *on and superintends the collection of debts without the intervention of the plaintiff. And there are sundry [*149] occasions on which the act of assembly makes it the duty of the justice to interfere and arrest the doings of the constable, whether execution has been executed or not; as when bail is given for an appeal, or for a stay, the defendant, if he applies to the justice in twenty days, and pays the costs accrued, shall have the execution arrested and annulled, (Purd. Dig. p. 453, sect. 6.) So if, within thirty days, he shows that he was from home and could not appear on the day of hearing, or was sick, and that he has a set-off against the plaintiff's demand, (Ibid. p. 453, sect. 7;) so, without any limitation of time, if the parties agree to a rehearing.

The fault here appears to have been in the justice, and not in the constable.

Judgment reversed.

Cited by Counsel, 4 Wh. 57; 4 W. 216; 5 W. & S. 458.

[CHAMBERSBURG, OCTOBER, 1828.]

Sheets against Rudebaugh.

IN ERROR.

Practice as to writs of error on awards of referees changed. Hereafter the court in which the cause is pending is to be resorted to for redress, in those cases in which heretofore writs of error were sustained to examine awards and proceedings of referees.

WRIT of error to a judgment rendered on a report of arbitrators in a cause in the Court of Common Pleas of *Bradford* county.

Russell, for the plaintiff in error.

Penrose, *contra*.

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The opinion of the court was delivered by

HUSTON, J.—The errors assigned were errors in fact, and that principally relied on, was, that Sheets had no notice to appear, and did not appear before the arbitrators: that, in fact, he was in the state of Ohio when they sat and decided the cause, and this was offered to be proved in this court.

The report, however, in the body of it stated, that the arbitrators heard the parties, their proofs and allegations; and it has been more than once decided, that what appears in the report cannot be contradicted in this court by affidavit: the judgment then must be affirmed.

Many cases have, however, occurred in this court, which have induced the court to reconsider the decisions as to the practice under this law; and, on mature and frequent reflection, we have [*150] come to the conclusion, that in the cases in which writs of error have been taken to reconsider, and, if wrong, reverse reports of arbitrators, under the compulsory arbitration act, the court in which the cause was pending, and to which the report was made, is the proper tribunal to obtain redress. When appeal is the proper remedy, the party must appeal; but, in those cases where writ of error has been resorted to, the application hereafter is to be to the Court of Common Pleas. In an early case, *White v. Thompson*, 4 Serg. & Rawle, 140, it is said, "There are certain things, which the law requires to be done before the jurisdiction of the arbitrators attaches; and these things the court may inquire into. The law prescribes the mode for entering the rule for arbitration, (service of this rule,) and appointing the arbitrators, (and notifying arbitrators and party of time and place of meeting,) and certain other things to be done by the arbitrators before they proceed in the cause. These things may be inquired of by the court in which the cause was pending at the time the rule was entered; because where the jurisdiction never vested in the arbitrators, the proceedings are void, and the jurisdiction of the court is not taken away. But when once the jurisdiction of the arbitrators has completely attached, the cause is out of court, nor can the court afterwards make inquiry into the proceedings before arbitrators. When the award is returned and entered, it is considered as a record of the court, and execution may be sued upon it. Should it appear that the arbitrators had exceeded their jurisdiction, or that the award was contrary to law, (or insensible, or impossible to be carried into effect,) it would be subject to reversal on a writ of error if the suit was pending in an inferior court; and if pending in this court, (which it can only be in Philadelphia,) we might set it aside, because no writ of error lies to this court. Whether an inferior court might set an award aside in

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such case, is not the question." This court had before determined, that a writ of error lay directly to the award of arbitrators; and in most counties, the Courts of Common Pleas have refused all interference, even in the most flagrant cases. Our reports show writs of error to reverse reports of arbitrators, because unmeaning; because they could not be carried into effect by executions; because money was awarded in an ejectment; because costs had been given, contrary to the express provision of the act of assembly; and, because notice did not appear to have been served on the party, or on all the parties, of the meeting of the arbitrators; and, because the rule appeared to be entered only by one of several plaintiffs or defendants, and many other cases. In a proceeding so novel as that under our compulsory arbitration law, it was right in the legislature not to be very minute in every detail of the proceedings; for no law could provide for every possible combination of circumstances which might and would occur, in carrying such an act into effect: it was left to the court to regulate such of the details as were not mentioned in the law. It was not to be expected that the court would, on the first occasion, foresee every possible case, [*151] or give those decisions as to practice, which would be found most convenient. The forms of practice in all our law proceedings are the result of reflection, on experiments made. The doubt above expressed—whether the court in which the cause was pending, and to which the report was made, could, in any case, set aside the report—left the matter open. The result of reflection and experience seems to favour the opinion, that in all cases where this court could set it aside wholly as void, or in part, as for costs given contrary to express law, the same power may be exercised by the court in which the cause was pending. This will save time and expense to the parties; and in many cases, tend to reach the justice of the case. Affidavits can then be produced to satisfy the court, whether notice was really served on a party who did not appear before arbitrators, a matter which sometimes does not appear on the face of the arbitrators' proceedings.

Where one of several defendants, or plaintiffs, enters a rule of reference, it can then be ascertained, whether he was not authorized to enter such a rule, or to appear and choose arbitrators; or to appear before them as the agent of his co-defendants or co-plaintiffs. In short, we believe it will, in almost every case, conduce to the better, as well as more convenient administration of justice, that every court, whose process is used to carry an award into effect, should exercise all the powers over that award, which this court has exercised, or can exercise. Our

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reports will show the extent of authority heretofore used. If new cases occur, they must be decided as they occur, and not anticipated.

Cited by Counsel, 6 W. 260; 7 W. 449; 5 R. 322; 6 W. & S. 240; 7 Barr, 95; 1 N. 66.

Cited by the Court, 5 W. 481; 1 M. 127; and affirmed in, 5 Wh. 311.

[CHAMBERSBURG, OCTOBER 20, 1828.]

Werth *against* Werth.

APPEAL.

On a sale of a building by virtue of a judgment and execution, mechanics' liens on the property are to be paid out of the purchase-money.

The Court of Common Pleas have a right to appoint a commissioner to ascertain disputed liens, &c.

APPEAL from the decision of the Court of Common Pleas of *Cumberland* county.

Penrose, for the appellant.

Watts, *contra*.

The opinion of the court was delivered by

SMITH, J.—The plaintiff, Adam Werth, has appealed to this court, under the third section of the act of assembly of the 16th of *April, 1827, from the decision of the court of Common Pleas of Cumberland county.

The following are the material facts of the case:—On, or about the 6th of November, 1824, Joseph Werth, the defendant, commenced the building of a stone barn on his plantation, situate in Frankford township, in the said county of Cumberland. On the 2d of April, 1825, Henry Kline and Leonard Boyer filed, in the proper office, their respective claims, under the act of assembly of the 17th of March, 1806, against Joseph Werth, for mason work done by them for Joseph Werth, on the 16th of November, 1824, at the said stone barn, in the township and county aforesaid, amounting together to eighty-five dollars and twenty-five cents. On the 2d day of April, 1825, Joseph Diehl, filed his claim, for carpenter work, done to the same barn, on the 23d of December, 1824, for twenty-three dollars and fifty cents. On the 25th of March, 1825, Adam Werth, the appellant, obtained a judgment in the Court of Common Pleas of Cumberland county, for one thousand four hundred and forty-two dollars and thirty-two cents, against Joseph Werth. The plantation of

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Joseph Werth, including the aforesaid barn, was afterwards levied on, by virtue of a *fieri facias*, which was issued on a judgment obtained by Abraham Wagner against Joseph Werth, on the 23d of March, 1825, for one thousand four hundred and fifty dollars; and sold on the 19th of August, 1827, to the said Abraham Wagner, for one thousand seven hundred and thirty-two dollars, under a *venditioni exponas*, by the sheriff of the said county. It is admitted, the money raised by the sale, is insufficient to pay all the judgments, and the above stated mechanics' liens. The Court of Common Pleas decided, that the lien was to be confined to the building erected and the land covered by it, with all the necessary means of enjoying it, in the usual way, and that the liens were first to be paid, and the residue of the purchase-money applied to the judgments, according to their priority; and appointed the prothonotary a commissioner to report the liens, and the proportionate value of the building, in reference to the whole tract, and that the said value should be paid to the liens *pro rata*, and the residue to the judgments. It is now alleged, that the court below erred, in directing the mechanics' liens to be paid out of the proceeds of the sale of the real estate of the defendant, and also in appointing a commissioner to ascertain the value of the barn, on which they were a lien. A question was raised below, as to the time from which a mechanic's lien should take effect; but this was properly abandoned on the argument, by the counsel for the appellant, as it has been settled, by repeated decisions, that the liens of mechanics, and persons who furnish materials, take effect from the commencement of the building, and are to be preferred to any other liens which originate subsequently thereto. 2 Serg. & Rawle, 138, and 170; 13 Serg. & Rawle, 269.

One question discussed here is, whether the mechanics' liens on *the barn, being on part of the land sold at the sheriff's [*153] sale, are to be apportioned and taken out of the purchase-money; or, whether the purchaser takes the property subject to such liens? In this case, the whole farm, with the barn, was sold by an execution, and it is ascertained, that the proceeds are insufficient to pay the judgments, and specific liens; but the proceeds will pay the liens, if the judgments be excluded. I know, it has been the practice in this state, for sheriffs to sell lands, on executions, for their full value, and to apply the proceeds of sale to the discharge of the judgments and liens, according to their priority. And I cannot see any good reason, why the proceeds of this sale should not be applied in the same way. Indeed, I consider the law, as it respects sales made by sheriffs as settled; for the Supreme Court has said, that the liens of judgments, and even legacies charged on lands, are devested on

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such sales ; that the judgment creditors and legatees must look to the sheriff, as the purchaser is not bound to see to the application of the purchase-money. These principles, if not directly decided, were at least, recognised in 6 Binn. 393, and in 3 Binn. 343 ; also, in a case decided by this court in Chambersburg, not reported, and in a later case, decided at Lancaster, at May Term, 1828, *Glass's Heirs v. Gilmore*.* In the present case, I must confess, I cannot see what possible inconvenience can result from applying the proceeds of the sale in the mode directed by the Court of Common Pleas. The creditors will thereby receive their money, according to legal priority. "Judicial sales," as was well observed by Justice Rogers, in *Glass's Heirs v. Gilmore*, "will be more easily and advantageously effected, when it is understood, that the property is freed from liens in the hands of purchasers, and when they are not bound to look to the application of the proceeds of sale." In this part of the opinion of the court, there is then no error.

Another error assigned is, that the court below erred in appointing a commissioner to ascertain the value of the barn, &c. We cannot think so. It is observed that the Court of Common Pleas tendered an issue to the party, to ascertain the value, before they appointed a commissioner. This offer of the court, the appellant did not think proper to accept ; and I cannot see what else, under such circumstances, the court could do. In truth, so far from committing an error, the court did exactly what was done, as I apprehend, by this court, in *Hinchman v. Graham*, 2 Serg. & Rawle, 170, where an execution was levied on an unfinished house of the defendant, and the money arising from the sale of it being brought into court, a commissioner was appointed to examine into, and report the liens. Here, then, we have furnished a precedent at least, which sanctions the proceedings of the Court of Common Pleas in this case. I am, therefore, of opinion, that there is no error in this judgment, and that it should be affirmed.

Judgment affirmed.

Cited by Connell, 3 R. 117 ; 5 R. 300.

The question as to the extent of a lien for building or repairing is discussed at length and the authorities marshalled in *Parish's Ap.*, 2 N. 155.

* See 17 Serg. & Rawle, 276.

*[CHAMBERSBURG, OCTOBER 20, 1828.]

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Long and Another *against* Laufman and Others, Commissioners of the County of Franklin.

IN ERROR.

A bond given to A., B., and C., commissioners of a county, and their successors, may be sued in the names of their successors.

A bond, given to commissioners of a county, to secure the performance of a contract for building a bridge, is valid, though not expressly directed by any act of assembly.

Query, whether the commissioners are bound by the report of the court and grand jury, in respect to the materials of which the bridge is to be built? But, if they are, it is no defence to a contractor, sued on his bond, that they have deviated from such recommendation.

Nor, that such bridge was not built on the public highway, if it was as near it as public convenience required.

ERROR to the Court of Common Pleas of *Franklin* county.

Crawford, for the plaintiffs in error.

Chambers, *contra*.

The opinion of the court was delivered by

ROGERS, J.—Several objections were made in the Court of Common Pleas, to the recovery of the plaintiffs, and the answers of the court to the points submitted by the defendants' counsel, have been assigned for error. The objections were in substance, that the suit should have been brought in the name of the obligees, or by the commissioners of Franklin county, in their corporate capacity: That the bond was not taken by the authority of an act of assembly, and is, therefore, void: That the viewers reported a wooden bridge, in which the grand jury and court concurred; and that the commissioners contracted for one of different materials: That the report of the viewers, approved by the court, and money paid in pursuance thereof, was in bar of the action; and lastly, that the bridge was not built on any public road or highway, nor were any steps taken for changing the route of the road, as required by the act of assembly of the 1st of March, 1815.

The suit was brought against Benjamin Long, the contractor, for an alleged breach of contract in building a bridge in the county of Franklin, and against his sureties, who undertook for the faithful performance of the work. It is brought in the name of Philip Laufman, Jacob Wonderlich, and Benjamin Hyers, the present commissioners, on a bond, which was given by the de-

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endants to David Bezou, Frederick Mills, and Andrew Thompson, commissioners of the county of Franklin, and their successors in office. The objection is, that the suit should have been brought, in the name of the obligees, or in the corporate name of the [*155] county. The *breach of the contract being ascertained, the objection is merely technical, and would have the effect of turning the county round to a new suit. As the Court of Common Pleas justly remarks, the office of commissioner is known to the laws, and the present plaintiffs sue as successors to the obligees named in the bond. Upon the principle, that *modus et conventio vincunt leges*, the defendants, who were parties to the contract, are estopped to deny the right of the plaintiffs to maintain this suit. *Reed v. Ingraham*, 3 Dall. 505, is strong to this point. That was an action brought by the assignee of a stock contract, to cover the amount of the difference due on the contract, which was expressed in these words:—

“On the 18th of April, 1792, I promise to receive from Joseph Boggs, or order, ten thousand dollars, six per cents., and pay him for the same, at the rate of twenty-three shillings, &c., per pound.

“FRANCIS INGRAHAM.”

It was assigned to William Reed or order, and suit was brought in the name of Reed, and the objection was to the form of the suit, on the ground, that it was not negotiable, so as to enable the assignee to recover in his own name. The action is well brought, say the court, as it is founded on a contract, in which the defendant expressly stipulated, that he would receive the stock from, and pay the price to Joseph Boggs, or order. On general principles of law, stock contracts cannot be regarded as negotiable; but a contractor may certainly make himself liable as if they were so, and the maxim, *modus et conventio vincunt leges*, applies forcibly to the case. And this derives additional weight from the circumstance, that until the decision of this court, in a case at Pittsburg, it was uncertain, whether counties were to be regarded as corporations, and liable to sue, and to be sued as such. And even now, it may be a matter of some doubt, what is the proper form of such contracts, whether in the corporate name of the county of Franklin, or as the commissioners of the county of Franklin. In the twenty-first section of the act of assembly of the 6th of April, 1802, the commissioners are authorized to make the contract, without prescribing the form in which it shall be made; and the twenty-sixth section of the act of assembly of the 11th of April, 1799,

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prescribes, "That the commissioners of each county within this commonwealth, shall have, and use one common seal, for the purpose of sealing their proceedings; and copies of the same, when signed and sealed by the said commissioners, and attested by their clerk, shall be good evidence of such proceedings, on the trial of any cause in any of the courts within this commonwealth." Although it may be uncertain, yet it would rather strike me, that the contracts of the commissioners should be made in the corporate name of the county; but I am not disposed to reverse this cause on that objection. In Kean and another v. Franklin, 5 Serg. & Rawle, 147, an objection *similar, [*156] in one respect, to the present, was taken and decided by the Supreme Court. That was a suit in the name of Walter Franklin, President of the Orphans' Court, &c., on a recognisance given to John Joseph Henry, and his successors in office. The objection (which was overruled by the court,) was, that the suit should have been brought in the name of the executors of Judge Henry. "I consider," says Chief Justice Tilghman, who delivered the opinion of the court, "the recognisance to the president and his successors, the same as if it had been to the president for the time being."

It has been further contended, that the bond not being taken under the authority of an act of assembly, is void. It is true, that there is no act requiring them to use this precaution, in relation to public contracts, nor is it necessary that they should be ordered to do so. Having the power, and indeed, being enjoined by the twenty-first section of the act of assembly of the 6th of April, 1802, to erect the bridge by contract, or otherwise, as might seem to them most expedient, they, as a necessary consequence, have the right to exact security for its faithful performance. It is a measure of precaution, highly necessary to the public safety; a neglect of which, would be highly censurable in the commissioners. But with what colour can the defendants object to the bond? It is a voluntary bond, forbidden by no act of assembly, and which may be supported at common law. It amounts to a stipulation on their part, which they are prevented from denying, for the maxim applies, *volenti non fit injuria*; and this distinguishes this case from Beacom *et al.* v. Holmes; Cochran *et al.* v. M'Knight, 13 Serg. & Rawle, 190, and M'Kee *et al.* v. Stannard. Those were cases of bonds given to obtain a discharge from imprisonment, and even varied from the conditions prescribed by the act of assembly, binding them to harder terms than the plaintiff had a right to exact. This was a voluntary bond, good at common law, and contrary to no act of assembly, the act being entirely silent as to the

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form of the contract. These principles are abundantly supported in an elaborate opinion of Judge Duncan, in *The Bank of the Northern Liberties v. Cresson*, 12 Serg. & Rawle, 314.

If the public interest requires the bridge to be of stone, rather than wood, a departure from the recommendation of the court and grand jury, will not render the contract void. The recommendation was certainly entitled to high respect, and ought not to be disregarded on slight grounds. It is not, however, absolutely binding, as it may well be doubted, whether the grand jury have power, under the twenty-first section of the act of assembly of the 6th of April, 1802, to designate the material of which the bridge shall be constructed.

On the report of the viewers, it is the duty of the court, grand jury, and commissioners, to determine, whether the bridge is [*157] *necessary, and would be too expensive for the township or townships to erect; which being entered of record, it becomes the duty of the commissioners to procure an estimate, &c., of the money which will be necessary to erect such bridge, and the commissioners of the county shall provide the same out of the county taxes, and proceed forthwith to have such bridge erected by contract, or otherwise, as shall seem to them most expedient. If they have the power, it is by implication, as it is not expressly granted in the act. The authority of the commissioners is very extensive in relation to this matter. They have a discretion, which seems to have been well exercised, as no objections have been made by the county. It comes with a bad grace from the defendants, who were as well aware of the defect of power, if any existed, as the commissioners. They have received their money under the contract, and wish to avoid it, when sued for on breach of their agreement.

The report of the viewers, as mentioned in the fourth exception, is no sufficient answer to this action. It was left by the court, as a persuasive fact for the jury, but not as conclusive of their right; and in this direction there was no error. The burden of proof was on the plaintiffs, who were bound to satisfy the jury, that there was a defect in the construction of the bridge. We concur in opinion with the Court of Common Pleas, that the bridge not being on the public highway, does not render the contract void. If the jury were satisfied, as it appears they were, that it was built near enough to the public road on which it was intended it should be erected, for the public convenience, it is sufficient for the maintenance of this suit, without changing the route of the road, as prescribed by the act of assembly of the 1st of March, 1815.

Judgment affirmed.

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Cited by Counsel, 1 Barr. 162; 22 S. 26, 44.

Cited by the Court, 2 R. 158. Followed as authority, 6 S. 65.

Although the Act of June 13, 1836, p. 1. 555, provides a special remedy for damage arising from any deficiency in the erection of a county bridge, it does not prohibit the county from taking a bond from the contractor, and on the bridge proving insufficient, suing directly on the bond. 6 S. 65.

*[CHAMBERSBURG, OCTOBER 20, 1828.]

[*158]

Greenfield and Another *against* Yeates and Others, for the Use of the Directors of the Poor, &c., of Franklin County.

IN ERROR.

A bond given to A. and B., who were directors of the poor, may be sued in their names for the use of the directors of the poor, though they constituted a body corporate.

Where a bond is directed by statute, to be taken by a corporate body, but no form is prescribed, it is good, though taken in the name of individual members as obligees.

ERROR to the Court of Common Pleas of *Franklin* county.

The opinion of the court was delivered by

ROGERS, J.—It is admitted, that at the date of the bond, on which suit is brought, the plaintiffs, Thomas Yeates, Jacob Heck, and Andrew Thompson, were directors of the poor and house of employment, for the county of Franklin. But it is contended, that being incorporated by the act of assembly of the 11th of March, 1807, the suit should have been brought in their corporate name, and not in the name of the obligees for their use. Without saying, whether a suit brought in that form, might not have been sustained, (of which there may be some doubt,) we are clearly of opinion, this action may be supported, upon the principles stated in *Long et al. v. Laufman et al.*, decided at this term. It is the contract of the defendants, and it is not for them to complain of a suit which has been entered in strict conformity to their agreement; *volenti non fit injuria*. The only difference between the cases is, that in *Long v. Laufman*, the bond was given to the commissioners for the time being, and to their successors, and in this it is to the directors individually, without binding themselves to their successors in office; although the whole contract shows, it was for the benefit of the corporation, for whose use this suit has been brought.

The next objection goes to the bond, which it is contended, is void; because, it is not taken in their corporate name. In the

[Greenfield and another *v.* Yeates and others, for the use of the Directors of the Poor, &c., of Franklin county.]

fourth section of the act of assembly of the 11th of March, 1807, they are incorporated by the name of, The directors of the poor and house of employment, of the county of Franklin, and are directed to appoint a treasurer annually, who shall give bond, with sufficient surety for the faithful discharge of the duties of his office. Although the bond is ordered, yet the form is not prescribed; and I am unwilling to believe, that where the provisions of the act of assembly have been substantially complied with, it avoids the bond. And this seems to be the distinction in *Armstrong et al. v. The United States*, 1 Peters' Rep.

[*159] 47. "Where a bond, required by a statute, *is taken, it ought to conform in substance at least, to the requisitions of the statute; and if it go beyond the law, it is void, at least as far as it exceeds those requisitions." And in *The Bank of the Northern Liberties v. Cresson*, 12 Serg. & Rawle, 314, inasmuch as the statute did not prescribe the form of the bond, a variation from the requisitions of the statute, was held, not to avoid the contract. And the case was illustrated by a decision which had been had on the statute, 23 Hen. 6, restricting bail bonds to be taken by sheriffs. The nature and form of the security are given by statute; it is to be by bond, and therefore, an agreement in writing, made by a third person, is void; because, the statute giving the bail bond, declares, "that if the sheriff takes an obligation in any other form, it shall be void; but if a bond is given to the plaintiff in another form than that which the statute prescribes, it is valid." 12 Serg. & Rawle, 314; 2 Saund. 60, a. No. 3.

It would appear to be reasonable, that corporations should have the same power as individuals, and, in such case, a bond, taken in the name of another, is good; and where the interest appears, it is protected by the court. Besides, if the corporation cannot recover on the ground that the instrument is void, the same rule must apply where they are defendants. In Pennsylvania, bank bills are not always taken in the name of the company. It would be dangerous to establish a principle which would cut the banks loose from such contracts.

Judgment affirmed.

Cited by Counsel, 1 W. & S. 263; 3 W. & S. 326; 1 Barr, 162; 2 J. 303; 1 C. 76.

Cited by the Court, 2 R. 183.

[CHAMBERSBURG, OCTOBER 28, 1828.]

Herbaugh, Assignee of Zentmyer, *against* Zentmyer.

IN ERROR.

A father agrees to convey land to his son for the sum of six thousand dollars, with certain reservations; by one of which the son engaged, for himself and his assigns, to give to his father yearly, and every year, twenty bushels of wheat, twenty bushels of rye, and twenty bushels of corn; also, two good loads of hay, &c. A conveyance is made, referring to the articles, and possession taken by the son. Held, on the purchase of the son's estate, at sheriff's sale, that this is a rent, and the covenant to pay it runs with the land, and binds the vendee.

ERROR to the Court. of Common Pleas of *Franklin* county.

The opinion of the court was delivered by

ROGERS, J.—This is a clear case. Christopher Zentmyer, by articles of agreement, agreed to convey to his son, Daniel, a tract of land, for the sum of six thousand dollars, with certain reservations *and among others the following: "The said [*160] Daniel Zentmyer engages to give to his father, Christo- pher Zentmyer, yearly, and every year during his natural life, and the life of his wife, Barbara, twenty bushels of wheat, twenty bushels of rye, and twenty bushels of corn; also two good loads of hay, &c." The article of agreement, which covenants for Daniel and his assigns, was carried into effect, and possession delivered by deed, in which there is a reference to the article. Where a covenant refers to a preceding instrument on which it is founded, that instrument shall determine the covenant; *George v. Bucher*, 2 Vent. 140. The plaintiff in error was the purchaser of Daniel's interest, at a sheriff's sale, and the question is, whether, as the legal assignee of the land, he is bound by the covenant in the article. When we ascertain the nature of the covenant, the question becomes one without difficulty. I look upon it as a covenant to pay a rent in kind. Rent is defined by Lord Chief Baron Gilbert, to be an annual return, made by the tenant, either in labour, money, or provisions, in retribution for the land that passes; Gilbert on Rents, 9; 2 Cruise on Real Property, sect. 2, title Rents, p. 307. And the rent may well be reversed on a conveyance of the fee simple; 2 Cruise, 310. It is a rent which issues out of the thing granted, and not a part of the thing itself. It is part of the annual profits. If this, then, be a rent, it is a covenant running with the land, and the defendant is clearly liable; for upon such covenants, which concern real property, or the estate therein, the

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assignee of the lessee is liable to an action for a breach of covenant, after the assignment of the estate to him; 1 Chitty, 36; 3 Wilson, 25, 29. There is the privity of estate, which is sufficient to maintain the suit. Covenants against assignees are of three kinds. Where the covenant relates to, and is to operate on a thing in being, parcel of the demise, the thing to be done, by force of the covenant, is a *quodammodo*, annexed to the thing demised, and shall go with the land, and bind the assignee to the performance, though not named. As, if the covenant is to repair a house then demised, and I may add, to pay rent, this shall bind the assignee, though not named. But it is otherwise, where the covenant relates to a thing not in being at the time of the demise; as, if it had been to build a brick wall on the land demised, this not being in *esse* when the covenant was made, it shall not extend to the assignee, if not named. But if the covenant mentions the assignee, as, if the lessee covenants for himself and his assigns, then the assignee shall be bound by every covenant, for anything to be done in the thing demised; as, to build a wall on the thing demised; but to anything which is merely collateral, as, to build a house on some other land, then the assignee shall not be bound, though he is named. So, when the contract is for the benefit of the estate, or to support it, it shall not bind the assignee, though not named; Spencer's Case, 5 Rep. 16; Bally v. Wells, 3 Wilson, 26; Cockson v. Cock, Cro. Jac. 135; Dean v. Chapter *of Windsor's Case, 5 [*161] Co. 24; Pollard v. Shaafer, 1 Dall. 210.

George Herbaugh is the legal assignee of Daniel Zentmyer, and as such, he is bound to pay the rent, which is a covenant running with the land, upon the principles above stated. It would be a matter of regret if the law were not so, as otherwise, a father would be prevented from securing a provision for himself, and at the same time advancing his children. There is no pretence, but that this was a fair family arrangement, to which the parties interested made no objection, as is manifest, by the substitution of the judgments against Daniel Zentmyer, in lieu of those which had been rendered against the father, Christopher Zentmyer.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 463; 5 Wh. 252; 7 W. 157.

Cited by the Court, 1 Wh. 351; 5 Barr, 408; 10 Barr, 284; 21 S. 63.

[CHAMBERSBURG, OCTOBER 30, 1828.]

Stambaugh *against* Yeates.

IN ERROR.

After a *fiery facias*, levied on land and returned, grain was sown on it; another creditor levied on the grain and sold it; and afterwards the land was sold on a *venditioni exponas*, issued on the first *fiery facias*. Held, that the creditor who levied on the grain, had the right to hold the proceeds.

WRIT of error to the Court of Common Pleas of *Franklin* county.

Crawford, for the plaintiff in error.

Chambers, *contra*.

The opinion of the court was delivered by

HUSTON, J.—It was admitted on the trial of this cause, in the Court of Common Pleas, that Robert Yeates had duly obtained a judgment against John Kyrne in the Court of Common Pleas of Franklin county, and issued a *fiery facias* to August Term, 1824, which was levied on a tract of land. A *venditioni exponas* issued to November, 1824; and an *alias venditioni exponas* to January Term, 1825, on which the land was sold to Robert Yeates, and a deed duly executed by the sheriff. On the 4th of April, 1825, Yeates entered into possession of the land. But in March, 1824, a judgment had been obtained by the administrator of Wilson, against John Kyrne, before a justice of the peace. Special bail was entered, and when the stay of execution had expired, an execution was taken out and levied in November, 1824, on the half of fourteen acres of wheat in the ground, being the share of John Kyrne, the landlord. It was sold for fourteen dollars and fifty cents to Stambaugh. The proof was, that the grain was put *in by a tenant, on the shares, on Kyrne's [*162] land; and that Kyrne, the landlord, was to have one-half. Nothing was said at the constable's sale about the sheriff's levy or advertisement. It was growing on the land of Kyrne, sold afterwards to Yeates, and of which Yeates came into possession afterwards, on the 4th of April, 1825. Stambaugh reaped the grain, and Yeates hauled it away, and this was an action of trespass against him for so doing.

It may seem strange, that we should now be deciding what is personal, and what real estate, in Pennsylvania; what passes to a purchaser at sheriff's sale, and what does not pass.

He who obtains a judgment against the owner of lands in this

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state, has thereby a right to apply to the laws to sell those lands; and when sold, has a right to the amount of his judgment from the proceeds of the sale; but, his judgment gives him no right to the lands, nor, to a certain extent, any control over them. The debtor, to be sure, cannot sell or lease the land, so as to destroy the creditor's right to the amount of his judgment out of the proceeds; but within this limit, the debtor is still absolute owner. The lands are not locked up; are not to be unproductive. The creditor may take out an execution, and may levy it on the defendant's personal property, (and grain growing is personal property,) alone, or on personal property and on lands. The personal property, including the growing crop, will go to the creditor on whose execution the levy was made: though if there is an elder judgment or mortgage, the proceeds of the land may go to discharge such elder judgment or mortgage; for lands are bound from the entry of a judgment or the recording of a mortgage; personalty only by execution, and from the delivery of it to the officer. If, then, lands and grain growing, may go to the different creditors, when sold on the same execution, it would seem strange, that the sale of the land carried with it the grain which had been previously sold as personal property on another execution. In this case, the grain was not sown when the *feri facias* was returned; the levy was not on grain, but on land. After the return of the *feri facias*, the grain was sown, levied on, and sold by another creditor on another execution; then came a *venditioni exponas* to sell the land, and the purchaser of the land claims what was not bound by his judgment, not comprised in his levy, not in existence at the return of his *feri facias*; and not directed to be sold, nor sold by his *venditioni exponas*. But this is not all; he claims what was legally and specifically levied on, and sold, and paid for by another person. Our law is not so absurd to permit one man to use its process, and sell, and receive purchase-money for a debtor's goods, and another to sell and take away the same goods from the first purchaser. That ever such an inconsistency should have been supposed to exist, arises from not distinguishing between the law of England and of this country. There, lands are never sold by process of the common law courts; here, they are every day. There, not only lands, but everything, part [*163] of *the freehold, is exempt from levy on a *feri facias*; here, the land, or any of its annual products, is the subject of levy and sale, and may, as has been stated, go different ways, though sold on the same suit and execution. There, they have no waygoing crop; a new tenant gets all the land, and all growing on the land; here the removing tenant comes back to reap all he sowed. There, the land, and all growing on

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it, are freehold; here, the land is freehold, and the annual product has, for many purposes, a different name, and is subject to different incidents.

It has been said, the landlord's share is rent, and rent cannot be levied on; and, therefore, Kyrne's share of this grain, could not be levied on and sold, and the purchaser got no title to it. It is easier to see the fallacy of this, than to exhibit this fallacy in words. A debt due to a person, is a chose in action, and not the subject of levy. But grain growing, is not a debt, not a chose in action, though it may, by an agreement of the parties, be destined to pay a debt; and being the property of him by whom the debt is due, it is his personal property, and may be levied on and sold. The purchaser paid for it. It was his by operation of law. He has done nothing to forfeit his right to it. The law made it his, and cannot, without injustice, take it from him; and in this case, does not take it from him.

TOD, J., dissented.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 10 W. 363; 5 W. & S. 162; 4 H. 180.

Cited by the Court, 1 R. 356; 3 W. 406; commented on in 1 Penn. R. 473, and explained in 8 Barr, 346; and 4 H. 178, and finally virtually overruled by 5 C. 68, but cited with approbation in 9 N. 219, and again restricted in 7 O. 520, s. c. 13 W. N. C. 429, where all the authorities are collected and discussed, [See note, 1 R. 356.]

[CHAMBERSBURG, OCTOBER 30, 1828.]

Gallagher, for the Use of Guss, *against* Kenedy and Another.

IN ERROR.

Parol evidence is not admissible to show the grounds of an order or decree of the Court of Common Pleas.

The surrender of the principal, to the custody of the sheriff, on the first day of the term appointed for hearing, discharges the bail from his liability on the bond to take the benefit of the insolvent acts.

ERROR to the Court of Common Pleas of *Perry* county.

Crawford, for the appellant.

Chambers, *contra*.

The opinion of the court was delivered by

SMITH, J.—Debt, by George Gallagher, for the use of Henry Guss, plaintiff below, and plaintiff in error, against Joseph H.

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Kenedy and Samuel Ross, on an insolvent bond, taken in pursuance *of the act of assembly of the 28th of March, [*164] 1820. The pleas were, payment, and performance of the conditions of the bond. Replication, *non solvit*, and non-performance, and issues. Trial, and verdict for Samuel Ross, and against Joseph H. Kenedy, and judgment.

On the trial, the plaintiff gave in evidence the above stated bond, dated the 4th of February, 1825, which had been approved by Judge Anderson, on the 5th of February, 1825, and informally assigned to Henry Guss, on the 12th of September following. The defendants, on their part, gave in evidence the petition of Joseph H. Kenedy, filed on the 7th of April, 1825, praying the Court of Common Pleas of Perry county, to extend to him the benefit of the insolvent laws, together with the proceedings thereon, that is to say, the order of the court appointing the 1st day of August, 1825, to hear the petitioner and his creditors; and further, directing fifteen days' notice to be given to them, before the day of hearing; the continuance on the said 1st day of August, of the proceedings, on motion, until next term, and an order directing notice to the creditors, to be given in the Perry Forrester, more than fifteen days before the said term; motion of Samuel Ross, the bail of Joseph Kenedy, on the 7th of November, 1825, (being the first day of the then next term,) requiring, that the petitioner, Joseph H. Kenedy, should be surrendered in discharge of his bail, he, being then actually in jail, and in the custody of the sheriff; and, the order of the court, thereupon, directing that he should be surrendered to the custody of the sheriff, and be held and kept by him in pursuance of this order, according to law, and until he should be legally discharged; to which order Henry Guss objected at the time.

The plaintiff's counsel then offered to show to the court, the grounds of the continuance of the petition of Kenedy, by the court, on the 1st day of August, 1825, and that it was on account of the sickness of the petitioner's family, and the omission occasioned by it, to serve his notices legally on his creditors. This evidence was objected to, and overruled by the court, whereupon the plaintiff's counsel excepted. The decision of the court below upon this offer, is the first error assigned by the plaintiff, in this court. The evidence was here closed and the court charged the jury as follows:—

“We think, the court had a right to continue the hearing of a case of an insolvent debtor, from term to term, upon ground laid. In this case it was so done, and the principal surrendered by the bail in discharge of his liability on the bond. We are of opinion, the surrender discharged the bail; but, a recovery

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may be had, if the plaintiff wishes it, against Kenedy, the principal."

To this direction the plaintiff excepted, and has also assigned it for error.

As to the first exception, the court below, believing that parol evidence was incompetent to show the grounds of an order, or decree of a court, rejected the evidence offered, and very correctly. It *has been repeatedly ruled, that an order, decree, or [*165] judgment of a court, having competent jurisdiction over the subject-matter, is conclusive and final, and cannot be examined again, collaterally, in another action. It was so decided by this court in *Sheetz v. Hawk et al.*, 14 Serg. & Rawle, 173, where the record of the discharge of an insolvent debtor was declared to be conclusive, as to facts appearing in it, and that it cannot consist with the general analogy of the law, that, in a collateral action, there can be any inquiry on the facts, which they have decided. The same reasoning applies with equal force against the attempt to inquire into the grounds of the decision of a court. The principle is the same, and I cannot discover any difference. We must presume, that the court, in giving its decrees, has done its duty. To examine into the grounds or reasons of their decisions, in a collateral suit, would lead to endless inquiries, and would not comport with the welfare and peace of the public. Some of these principles have been recognised at this term, in the case of *Asper v. Lease et al.* In fact, I believe no case can be found, in which parol evidence, respecting the grounds of the judgment of a court, has been admitted. See *Leg v. Leg*, 8 Mass. Rep. 99. The court was, undoubtedly, correct in refusing evidence calculated to show the grounds on which it had decided, and made a decree in another proceeding.

As to the objections made to the charge of the court, they are equally clear of difficulty. Why, I would ask, should not courts of justice, upon proper and legal grounds shown to them, have a right to continue from term to term, the trial of a cause? Has this discretion ever been denied to a court? Is it not constantly, nay, daily, exercised by all courts, justices of the peace, referees, arbitrators, and every other tribunal of justice? In the case of *Sheetz v. Hawk*, it appeared, that the hearing of the insolvent debtor, was continued from day to day, by the court, it being the practice of that court. When the case came before the Supreme Court, they said, the court below had authority so to do. The power of the court, to continue the hearing of a cause, is necessary to the due administration of justice; for many accidents may occur, to render it the absolute duty of a court to continue and postpone the hearing, some of which are

[Gallagher, for the use of Guss, v. Kenedy and another.]

enumerated by Justice Duncan in the case just referred to. I, therefore, can perceive no error in this part of the charge.

But it is further insisted, that the court below also erred, in stating to the jury, that the surrender of the principal to the custody of the sheriff, discharged the bail from his liability on the bond. The bond was conditioned for Kenedy, to appear at court, there to remain, and abide the final order of the court, and to comply with all things required by law to procure his discharge under the insolvent laws, &c. For the performance of this condition by Kenedy, Ross become bound. I assume it, as a well established principle, that a surety is not answerable [*166] beyond the scope of his *engagement. It is very evident, that in this case, Ross engaged that Kenedy should appear at, and abide the final order of the court, which final order was, that he should be surrendered to the custody of the sheriff in discharge of his surety. He was so surrendered. This surrender, then, must leave the bail in the same situation as if Kenedy had been actually discharged; and it is only when the petitioner is neither discharged, nor surrendered on the day on which he was to be discharged, that the condition of the bond becomes forfeited, and the bail of course liable, which is not the case here. The charge of the court in this, was also correct, and the judgment must, therefore, be affirmed.

Judgment affirmed.

Cited by Counsel, 4 W. 70; 1 W. & S. 525; 11 C. 461; 2 G. 390; 3 S. 200; 20 S. 317.

Cited by the Court, 2 Wh. 473; approved, in 2 R. 207.

[CHAMBERSBURG. OCTOBER 31, 1828.]

Fickes, with Notice to Myers and Deardoff, *against*
Ersick and Another.

IN ERROR.

If neither the levy on land, by virtue of an execution, nor the sale, nor deed, is made subject to any incumbrance, no loose talk among the bystanders at the sale, no whispers or insinuations by strangers, can affect the land, in opposition to the record, and the acts and declarations of the sheriff at the time of sale, unless in cases of fraud.

Query, whether, if land is levied on and sold, expressly subject to an incumbrance, it is good.

It seems, either the plaintiff or defendant may have such levy or sale set aside.

Where land is mortgaged to secure an annual instalment, a *scire facias* can-

[Fickes, with notice to Myers and Deardoff, v. Ersick and another.]

not issue as each instalment becomes due: the party must bring ejectment, or proceed on his accompanying bond.

Query, whether a mortgage to secure an annual sum during life is necessarily a lien, subject to which the land must be sold on a *scire facias*.

WRIT of error to the Court of Common Pleas of Adams county.

The opinion of the court was delivered by

HUSTON, J.—This was a *scire facias* on a mortgage, sued by Sophia Ersick against Fickes, the mortgagor, and the other defendants, terre-tenants. Fickes appeared, and confessed judgment. The two defendants appeared, and pleaded, that they had purchased the land sold by the sheriff of Adams county on an execution on certain judgments against Fickes, and paid their money, and held the land clear of all incumbrances.

The plaintiff was permitted to prove certain conversations which took place at a time previous to the sale, when this land was up for sale; and also, some talk among the bidders at the sale, from which it might be inferred, the defendants thought, or suspected, they were buying, subject to this mortgage. And the defendants *offered to prove, that in fact, they [*167] had consulted counsel, and knew, or believed they did not purchase subject to the mortgage. Clearly, if the evidence on the part of the plaintiff was legal, the defendants might rebut it. In this case, both sheriff and crier proved, that it was sold absolutely, and no mention made of any lien or incumbrance: That Abraham Fickes, the mortgagor, requested the sheriff to have it cried subject to the mortgage, but this was flatly refused. And, we are all of opinion, that if the levy is not subject to any mortgage, or incumbrance, the sale is not expressly subject to incumbrance, and the deed is not, that no loose talk among the bystanders, no whispers or insinuations from strangers, can affect the land, in opposition to the record, and the acts and declarations of the sheriff at the sale. Cases of fraud in a bidder, in circulating matters calculated to deter others, may be exceptions. Generally, by the laws of this state, a purchaser at sheriff's sale takes the land clear of all incumbrances, of what kind or nature soever, (ground rents in fee, and certain cases provided by act of assembly excepted.) It seems to be understood, however, that if it is levied on and sold, and conveyed, expressly subject to some specific lien, it may be held subject to such lien. I would not agree even to this. I would say, the law sells it, and directs how it shall be sold, and no one has power to alter this; and clearly, if either the plaintiff or defendant ask it, the court must

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set aside a levy or sale, subject to incumbrances; either may have a sale, according to law.

The associate judges overruled the opinion of the President, and directed the jury they might find for the plaintiff. Now the instalment sued for was due some months before the sheriff's sale, and most clearly was no lien; but further, the act of assembly is express, that a *scire facias* on the mortgage, shall only issue after one year from the time the money is due on the mortgage. Here, the mortgage for two hundred and fifty pounds was to secure to S. Ersick fourteen pounds nineteen shillings and four pence per year, during her life. It never has been supposed, a mortgage can be sued as each instalment falls due. The suit by *scire facias* put an end to the security, and sells the whole estate. But Mrs. Ersick was not without a remedy; she might sue on the bond which accompanied the mortgage; or she might have brought ejectment, and, if her mortgage was still a lien, recover, and hold possession to pay herself. There was, then, error in saying the *scire facias* could be supported at all.

A matter was discussed, which does not appear on the record; viz.: Whether this incumbrance, being a mortgage to secure a certain sum annually to Mrs. Ersick, during her life, was not necessarily a lien, subject to which the land must be sold, and continue during her life. On this subject the court give no opinion; for myself, I have one. The policy of our laws, and the welfare of debtors and creditors, require, that sales should be untrammelled. In England, the judges have been astute to [*168] get clear even of acts *of parliament, restraining free alienation, and it is not easy to find a reason to justify a court in encouraging devices to perpetuate incumbrances.

Judgment reversed.

Cited by Counsel, 3 R. 118; 4 R. 444; 2 Wh. 146; 3 Wh. 492; 5 Wh. 184, 416; 2 W. 283; 6 W. 140; 8 W. 217; 6 W. & S. 282; 9 W. & S. 104; 8 H. 238; 3 Barr, 158; 1 C. 72.

Cited by the Court, 8 W. 297.

[CHAMBERSBURG, OCTOBER 31, 1828.]

Stump and Others *against* Findlay and Others.

IN ERROR

Devise "to A. during his natural life, and, after his decease, if he shall die, leaving lawful issue, to his heirs, as tenants in common, and their respective heirs and assigns forever; but, in case he shall die without leaving lawful issue, then to B., the brother of A., to hold to him, his heirs and assigns forever:"

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Held, that A. took an estate for life; that A.'s issue, as tenants in common, and B. took, respectively, contingent estates in remainder, but one of which remainders could ever become vested; and, that neither of these remainders could become vested, till the death of A.

In a common recovery, the tenant to the *præcipe* must be tenant by a legal title. Where, therefore, a recovery was suffered, and the title of the tenant to the *præcipe* rested only in articles of agreement: Held, that the recovery was void.

A common recovery, whether it is valid or void, works a forfeiture of the particular estate. Where A. had an estate for life, and the issue of A., as tenants in common, had contingent, concurrent estates in remainder, and a recovery was suffered by A. of the whole estate: Held, that, although the recovery was void, for want of a good tenant to the *præcipe*, the estate of A. was forfeited by the recovery, and the contingent remainders of his issue were consequently destroyed.

ERROR to the Court of Common Pleas of *Franklin* county.

John Findlay, Samuel Findlay, John Palmer, and Mary, his wife, who was formerly Mary Findlay, the plaintiffs below, and defendants in error, brought an action of ejectment for one hundred and thirty-two acres and ninety-nine perches of land, against John Stump, John Myers, and their tenant, the defendants below, and plaintiffs in error. The jury found a verdict for the plaintiffs below.

The title of the plaintiffs below was as follows: In 1765, John Findlay, Sen., the father of the plaintiffs below, claimed five hundred acres of land, of which the premises in question are a part, under a warrant to John Kerr, for one hundred acres, on which warrant, a survey, including the greater part of the land thus claimed, appeared to have been made by Samuel Lyon, then an assistant to the deputy surveyor. Of this survey, a rough draft, bearing no date, nor reference to any authority or office title, had been found in the office of the surveyor, some time before the trial in the court below, but was subsequently lost.

In 1768, John Findlay, Sen., conveyed two hundred and eight acres of this tract to his son James, and in 1783 he devised the *residue, including the premises, as follows: * "I give and bequeath to my son, John Findlay, (the father of [*169] the plaintiffs below,) all that plantation and tract of land whereon I now dwell, together with the appurtenances, to hold to him, the said John Findlay, during his natural life. And, after my son John's decease, if he shall die leaving lawful issue, I give and devise the same to his heirs, as tenants in common, and their respective heirs and assigns forever. But in case my said son John shall die without leaving lawful issue, I give and

* Vide, a question on the construction of this will. *Findlay's Lessee v. Riddle*, 3 Binn. 139.

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devise the same to my son, James Findlay, to hold to him, his heirs and assigns, forever."

John Findlay, Sen., died in 1783, and John Findlay, the devisee above named, and father of the plaintiffs below, died in 1801.

The defendants below claimed under the following title. In 1788, James Findlay, the son of John Findlay, Sen., obtained a warrant for two hundred acres, in the name of his own son, John Findlay, the second, and in 1790 he had a survey of one hundred and thirty-two acres, and ninety-nine perches, the premises in question, made by Matthew Henderson; against the acceptance of which, John Findlay, the devisee, entered a *caveat*, in 1791. In 1790, a resurvey was also made by Henderson, on the warrant to John Kerr, in 1749, of two hundred and fourteen acres, and some odd perches; of which tract the plaintiffs below were now in possession, and which, with the premises in question, made the tract of three hundred and forty-seven acres and nineteen perches, mentioned hereafter.

In 1793, John, the devisee, entered into articles of agreement with his brother James, and his nephew, John Findlay the second, in which he declared, that he claimed the land devised by the will of his father, for the purchase of the premises in question, and he afterwards received, in the same year, conveyances of the premises from both of them. In 1794, John, the devisee, conveyed eleven and a half acres of the premises to Myers, one of the defendants below, and plaintiffs in error.

In August, 1797, articles of agreement were entered into between John Findlay, the devisee, and George Hetich, and Samuel Riddle, for the conveyance of the remainder of the premises. In December, 1797, a common recovery, with double voucher, was suffered of the premises in Franklin county, in which Joseph Parks was demandant, Hetich and Riddle were tenants, John Findlay, the devisee, was first vouchee, and Yost Biddle second vouchee. In April, 1798, Parks conveyed the premises to John, the devisee, in trust, to convey the same to Hetich and Riddle, and on the same day a conveyance was accordingly made to them by the said devisee. In December, 1798, a patent was procured by Hetich and Riddle, covering the tract thus conveyed to them, and in March, 1799, Hetich and Riddle conveyed one hundred and *twenty-one acres, [*170] the aforesaid remainder of the premises, to Stump, one of the defendants below, and plaintiffs in error.

On the trial, the plaintiffs below, after having given evidence that the draft of the survey made by Samuel Lyon had been found in the office of the surveyor, and had been subsequently lost, offered to give parol evidence of its contents, by Archibald

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Fleming, Esq., the deputy surveyor. The defendants objected, but the court admitted the evidence, and signed a bill of exceptions. The admission of this evidence was the first error assigned.

The court below, in their answers to some of the points proposed by the counsel, charged the jury as follows: "The plaintiff's claim and title appear to be merely equitable; a settlement right only. The draft is not evidence of title in the plaintiffs to the land, in the possession of the defendants; nor is it a survey by the proper officer, on any warrant. It appears, at best, to be a mere private survey, and circumscription of boundary; which, if known to the neighbourhood, and claimed by right of settlement, and such settlement were duly continued, would, at least after the act of assembly, allowing four hundred acres to be surveyed on warrants, and provided the boundaries were reasonable, give an equitable title to the three hundred and forty-seven acres, and nineteen perches." This was the second error assigned.

The court also charged the jury: "There is nothing in this case which calls upon the jury to presume anything for, or anything against, the common recovery.

"The regularity of the common recovery, and of the proceedings necessary to constitute it, does not appear to be called in question by the plaintiffs.

"The estate of John Findlay, the devisee, under his father's will, was not an estate tail, but an estate for life only; and the estate in remainder of the plaintiffs is not barred by the common recovery." This was the third error assigned.

The case was twice argued before this court; the second argument being confined to the third error.

G. Chambers, and *J. Chambers*, for the plaintiffs in error.

1. The admission of the witness, to prove the contents of the draft, is not warranted by any decision of the court. But the draft itself, if produced, would not have been evidence. It did not appear to have been the official act of any deputy surveyor, nor to represent any survey made on the ground. It had no date; it recited no warrant, or other authority, under which it was made. It furnished no evidence by whom it was made, nor that any surveying fees had been paid. *Miller v. Carothers*, 6 Serg. & Rawle, 215.

2. The draft, if evidence of anything, was evidence of a survey. John Findlay, Sen., being the owner of Kerr's warrant for one hundred acres, his title was by warrant, and not by settlement. *Bonnet's Lessee v. Devebaugh*, 3 Binn. 191. The court erred also in charging, that more than three hundred acres

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[*171] could be taken *under a settlement right. The custom was, to take three hundred acres, and no more. *Davis's Lessee v. Keefer*, 4 Binn. 161. The owner of an improvement right might take three hundred acres, or as much less as he pleased. *Gordon v. Moore's Lessee*, 5 Binn. 136; *Ellis v. Different Agents*, 2 Smith, 167. A settler is entitled to three hundred acres only, and cannot claim ten per cent. additional, if there is any interfering right. By the act of the 1st of April, 1784, sect. 4, four hundred acres might be taken on a warrant. Act 21st December, 1784; Act 3d April, 1792, sect. 3.

3. The court erred, in charging, that the estate in remainder of John, the devisee's children, was not barred by the common recovery. The case of *Findlay v. Riddle*, 3 Binn. 139, we conceive, decides this point. If the remainder vested in the son of John Findlay, the devisee, who was born before the recovery, and that child had died during his father's life, the remainder of James Findlay would have been defeated, contrary to the devisor's intent. A fee cannot be limited on a fee, at common law. But there may be several contingent estates in fee, one of which may become vested by the occurrence of a particular event, and then all the others are destroyed. *Fearne*, 372, 373; *Dunwoodie v. Reed*, 3 Serg. & Rawle, 435; *Abbott v. Jenkins*, 10 Serg. & Rawle, 296. Here, the remainders were contingent until the death of John, the devisee; and were barred by the common recovery, suffered in December, 1797. 1 Salk, 229; *Loddington v. Kime*, L. Ray. 203; 2 Black. Comm. 171. The proceedings in the recovery may be supported, according to the laws of Pennsylvania. The articles of agreement between John Findlay, the devisee, and Hetich, and Riddle, gave them an estate, which, in Pennsylvania, may be regarded as the legal estate. But, if there was error in the recovery, it was good till reversed, and seven years having elapsed, it cannot now be reversed. Act of the 13th of April, 1791, 1 Sm. Laws, 205, note; 3 Sm. Laws, 34. The roll of the recovery declares a writ of seisin to have been issued, and the sheriff returned, that he had delivered seisin. The recovery here wrought a forfeiture, although it might not bar a tenancy in tail. 4 Cruise, Recovery, c. 3; 1 Cruise, 94, Estate for Life, s. 99. It is a forfeiture, when it is impliedly admitted in a court of record, that the reversion is in a stranger. 2 Bac. Abr. 507; 4 Cruise, Recovery, c. 12, s. 1. So, where a tenant for life claims the inheritance. Co. Litt. 252, a.; 3 Bac. Abr. 570; 4 Cruise, Title, 36, c. 12, 31; 2 Leon. 66; 4 Leon. 132; *Coventry on Recoveries*, 53; *Willes*, 343. A fine, although void, works a forfeiture. 4 Com. Dig. Forfeiture, A. 2; 4 Cruise, 504; *Lyle v. Richards*, 9 Serg. & Rawle, 329.

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Dunlop and M' Cullough, for the defendants in error.

1. The original draft was evidence, and was proved to have been lost. John Findlay, Senior, was assignee of Kerr's warrant, for one hundred acres; and the draft was some evidence of a survey on that warrant. *Boyles v. Johnston's Executors*, 6 Binn. 126; **Sproul v. Plumsted's Lessee*, 4 Binn. [*172] 189; *Miller v. Carothers*, 6 Serg. & Rawle, 215; *[*172]* *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; *Hoover v. Gonzalus*, 11 Serg. & Rawle, 314.

2. A settlement right was not limited to three hundred acres, after it was allowed to take a warrant for four hundred acres. A settler, by circumscribing his claim by an unofficial survey, may gain a title by his settlement right, if the quantity be no more than the law allows. *Gordon v. Moore's Lessee*, 5 Binn. 136. But, if this was error, it was not injurious to the defendants below, and is, therefore, no ground for reversing the judgment. *Gibbs v. Cannon*, 9 Serg. & Rawle, 202; *Graham v. Moore*, 4 Serg. & Rawle, 467. A tenant for life cannot set up an outstanding title in a third person, against the reversion. *Van Horn v. Fonda*, 5 John. Ch. 388; *M'Pherson v. Cunliffe*, 11 Serg. & Rawle, 427; *Caufman v. Presb. Congreg.*, 6 Binn. 59.

3. It is admitted, that the estate of the plaintiffs below was originally a contingent remainder, but it became vested on the birth of the eldest son of John Findlay, the devisee, who was born before the recovery was suffered; and it afterwards opened, to let in the subsequent children, as tenants in common with the eldest. 2 Black. Comm. 169; *Cruise, Remainder*, c. 1, ss. 32, 45. A devise to one and his sons, vests when a son is born. *Fearne*, 232, 241; 1 *Ld. Raym.* 208. Here, the word, issue, means children. *Findlay's Lessee v. Riddle*, 3 Binn. 147; *Dingley v. Dingley*, 5 Mass. 537; *Wager v. Wager*, 1 Serg. & Rawle, 374; *Abbott v. Jenkins*, 10 Serg. & Rawle, 296; 2 *Ves.* 610; *Cruise, Remainder*, c. 4, s. 24. If the devisee here had died, and left only grandchildren, they could not have taken, if the estate had not vested in their father. 1 Serg. & Rawle, 374; *Clark v. Baker*, 3 Serg. & Rawle, 486; *Geering's Lessee v. Shenton*, Cowper, 411. The courts lean in favour of vested remainders. 5 Mass. 537; 1 Serg. & Rawle, 374, 381. *Doe v. Provoost*, 4 John. 61; *Cruise, Remainder*, c. 4, s. 24; 1 *Ld. Raym.* 203; 10 Serg. & Rawle, 296. Dying without lawful issue, means an indefinite failure of issue, when applied to real estate. 1 *P. Wms.* 667; Cowper, 410; 3 Serg. & Rawle, 477. But this is not such a recovery as will bar the contingent remainders. It was suffered in December, 1797, and Hetich and Riddle were not legal tenants to the *præcipe*. The deed from

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John Findlay, the devisee, to Hetich and Riddle, was not executed till April, 1798. When the recovery was suffered, their only title was under the articles of agreement. The tenant to the *præcipe* must be the tenant to the legal estate, at least before judgment is rendered on the recovery. Cruise, Recovery, c. 2, ss. 1, 16; 2 Black. Comm. 359; Pigott on Recov. 2d ed. 28; Cruise, Recovery, c. 2, s. 1, c. 14, s. 16. There must be fifteen days between issuing and returning the writ of seisin, which is not the case here. Unless there be a writ of seisin, nothing is gained by the recovery. Lewis v. Whitham, 2 Strange, 1185. [*173] Unless the writ is good, there is no *forfeiture of the life estate. 9 Serg. & Rawle, 347; Swann v. Broom, 3 Burr. 1596; 2 P. Wms. 177; 3 P. Wms. 363. Judgment in common recovery, not executed by writ of seisin, has no manner of operation. Cruise, Recovery, c. 10, s. 16, c. 6, s. 3; Warren v. Greenville, 2 Str. 1129; 1 Mod. 117; Case of Lord Say and Seal, 10 Mod. 40; Bridges v. Duke of Chandos, 2 Burr. 1065; Lyle v. Richards, 9 Serg. & Rawle, 343. An entry is absolutely necessary to put an end to the estate. Fearn, 247, 323.

The opinion of the court* (DUNCAN, J., taking no part, having been counsel for the plaintiffs in error, and TOD, J., also taking no part, having ruled the cause below,) was delivered by

GIBSON, C. J.—The essential facts of the case are these: In 1765, John Findlay claimed five hundred acres of land, including the premises in dispute, on a warrant for one hundred acres; and had procured Samuel Lyon, an assistant of the deputy surveyor, to make a survey of his claim; a rough draft of which, without date, or reference to any authority, or office title, was found in the office of the deputy. In 1786 he conveyed two hundred and eight acres to his son James; and, in 1783 devised the residue to his son John, for life, with concurrent contingent remainders to the issue of John, and their heirs, as tenants in common; and, in the event of John's leaving no issue, to James, in fee. The plaintiffs claim as the children of John.

The defendants claim paramount the will; and they also resist the title of the plaintiffs under the will, on the ground, that the contingent remainder limited to them, was barred by a common recovery suffered by John, the tenant of the particular estate.

The paramount title is this. In 1785, several years after the

* This opinion appears to have been drawn up for delivery at September Term, 1827, but, for some reason, was omitted in the publication of the decisions of that Term.

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death of the testator, James, his son, obtained a warrant, in the name of his own son, John, for two hundred acres, part of the land devised; and in 1790 had a survey of one hundred and thirty-two acres made on it, against the acceptance of which, John, the devisee, entered a *caveat*, in 1791. But, in 1793, this same John, by articles, with his brother and nephew, in which he declares, that he claims the land, agrees to purchase their title for twenty pounds. Under this title, eleven acres are conveyed in 1794 to Myers, (one of the defendants,) in fee; and in 1797 the residue is artieled, to be sold to George Hetich, from whom, after he had suffered the common recovery, whose effect on the contingent limitation to the plaintiffs forms the second branch of the inquiry, title is regularly deduced to Stump, another of the defendants; the other defendant is their tenant. The first question, therefore, is, whether a party who claims under John, the devisee, can set up a paramount title, in opposition to the provisions of the will: And I am of opinion, he cannot.

*I am at a loss to imagine a clearer case of election. [*174] In courts of law, as well as of equity, no one can claim under a deed, without claiming under the whole of it, or take one clause, and reject the rest; the whole must be confirmed, or the whole abandoned. Just so of a will. If the testator devise the estate of Titius to another, and give Titius a legacy, Titius shall not hold the estate, and claim the legacy; he shall not take a benefit under the instrument, without suffering the whole of it to take effect. And it is immaterial, whether the testator believed he had a right to dispose of the estate of Titius, or intended to assume an arbitrary power. If Titius will avail himself of his bounty, he shall not disappoint his will. 7 Wils. Bac. app. 445; 2 Mad. Ch. 40. With the exception of a single case, the doctrine in regard to wills, has been held as broadly as I have stated it, from *Noyes v. Mordaunt*, 2 Vern. 581, to the present day. In the excepted case, (*Forrester v. Cotten*, Amb. 388,) it is true, Lord Keeper Henly expressed great doubt, whether such a condition (as he called it,) can be coupled with a partial estate, as the devise would be good, or otherwise, just as the devisee in remainder should submit to the will. I trust it will be considered no disrespect to say, the doctrine was then newly sprung up, and its principles were perhaps imperfectly explored; for it is certainly now held, that the equity, in cases of election, instead of being a condition, which, if not performed, induces a forfeiture, is to sequester the devised interest, till satisfaction be made to the disappointed devisee. 2 Mad. Ch. 42. And, beside, I take the principle in *Forrester v. Cotten* to have been since overruled. Such, then, being the rule, is the

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case before us within it? A testator devises an estate to his son for life, who enters, and enjoys the whole of it; but who, afterwards, acquires an adverse title to a part of it in fee; declaring, at the same time, that he already has a title under the will. After this, will it be endured, that he shall set up this adverse title against the title of the testator? It would be a shame and a scandal if he could. It was his duty to perfect the testator's title, for the benefit of himself, and those in remainder, instead of colluding with an adverse claimant, who probably was his creature, to defeat it. The devise of the whole was in confidence, that the devisee would do no act to defeat the testator's intention, as to any part: and the devisee having elected to take under the will, shall not be permitted to claim in repugnant rights. John, the devisee, therefore must be taken to have made the purchase in aid of his former title, and in trust for those beneficially entitled, under the limitations in the will.

This view of the first branch of the defence, supersedes all inquiry into the grounds of the first two errors; because the title set up by the defendants, being the title of the plaintiffs, if not barred by the recovery, it is immaterial, whether there was an abstract error in admitting a witness to prove the contents of a survey, or in charging, that the draft was evidence of an equitable right, under the testator's settlement; and that [*175] he was entitled to more than three hundred acres. All this was obviated, by the fact, that there was an available title under the warrant and survey in the name of John, the son of James; and that the defendants would have been estopped from denying the title of the testator were it otherwise.

Then, as to the effect of the common recovery. John Findlay, the devisee, having a son then living, entered into articles for the sale of the premises, to George Hetich, against whom, and Samuel Riddle, Joseph Parks brought a writ of entry; the tenants vouching John Findlay, and he vouching over the common vouchee, against whom judgment was rendered by default. The demandant then conveyed to John Findlay, in trust, for Hetich and Riddle, from whom the defendants regularly deduce their title; and the first objection by the plaintiffs is, that the recovery was void, for want of a good tenant to the *præcipe*.

It is an elementary principle that the party against whom the writ is brought, must, by right, or by wrong, have an estate of freehold at the time of the judgment. Here there was nothing but an agreement, and one which the tenant, not having paid the purchase-money which was to precede the conveyance, had not even a right to have executed. In a case of this sort, there is no such thing as an equitable tenant to the *præcipe*; for although in an adversary proceeding, we will, to prevent a failure

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of justice, consider those things as already done which chancery would compel a party to do, there is no necessity for extending the rule to common recoveries, which are not adversary proceedings. Their effect in barring contingent remainders is exclusively technical, and *strictissimi juris*; and, as there are no equitable considerations to recommend them to indulgence, the tenant for life escaping personal chastisement only because there is no trust in the case to give a chancellor jurisdiction, (Co. Litt. 290, b, note 249,) the parties ought to be held closely to technical form. But even a conveyance would not have made the recovery lawful, as John Findlay was a bare tenant for life, and by the form of conveyance usual here, could have passed no greater estate than was in him; so, that by the statute, 14 Eliz. c. 8, the recovery would still have been void, for want of a subsequent estate of inheritance in the tenant. Something was said at the argument, of presuming a conveyance of an estate of inheritance from lapse of time; but, I believe, no case of the kind is to be found. After a very long possession, the surrender of a precedent lease for life, to enable a remainderman in tail to make a tenant to the *præcipe*, has been presumed; but never, after a lapse, as here, of only fifteen years. Something was also said about the recovery being good till reversed by writ of error. It is certain, however, that it may be abated by entry and plea, and consequently, in an action of ejectment; the law being so laid down both in Booth on Real Actions, 77, and Pigot on Recoveries, 156. The question, therefore, is whether a void recovery, such as this, will bar a contingent remainder.

*A recovery produces such a bar by working a forfeiture of the particular estate. Previous to statute 32, [*176] Hen. 8, c. 31, a recovery barred even vested remainders, by enlarging the particular estate to a fee; in consequence of which, vested estates were turned to a right, and contingent ones irremediably destroyed. But by that statute, and 14 Eliz., which has superseded it, a recovery, suffered by a bare tenant for life, is utterly void. Still, however, it was held, in Pelham's Case, 1 Rep. 15, to work a forfeiture of the particular estate, and consequently, the destruction of all remainders depending on it. It is said not to have produced that effect here, because it was void for want of a good tenant to the *præcipe*. But it would have been equally void with a good tenant to the *præcipe*. The objection would be unanswerable in the mouth of a tenant in tail, who can be only barred by a valid recovery; but, it is of no avail in the mouth of a contingent remainderman, where the particular estate is not an estate tail, because he can be barred by no recovery which is valid. In delivering the opinion of the judges in *Dormer v. Parkhurst*, 3 Atk. 135, Chief Justice

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Willes said, there are many cases where an act may be void against another, and yet be a forfeiture to the person; and he gave, as an instance, the case of a copyhold tenant, a lease by whom is certainly void, but nevertheless a forfeiture: so in the case of a fine. Here the offence of the tenant of the freehold, consisted in suffering himself to be vouched without counterpleading the warranty; thus attempting, by matter of record, to convey a greater estate than was in him, the consequence of which is indisputably a forfeiture.

But as the tenant for life had a child born before the recovery was suffered, it is argued, that the remainder vested in such child, subject to open and let in afterborn children.

In cases where the remainder was expressly limited to children, such a construction has prevailed; and had the intention clearly been to vest the estate in the children of John, in any event, it would have prevailed here. After the devise to John for life, the words are: "and after my son John's decease, if he shall leave lawful issue, I give and devise the same plantation and tract of land to his heirs, as tenants in common, and their respective heirs and assigns, forever. But in case my son John shall die without leaving lawful issue, I give and devise the same plantation and tract of land, to my son, James Findlay, to hold to him and his assigns forever." The word heirs, is to be qualified so as to mean issue, it being plain from the context, that both these words were used in a sense, neither so extended as to amount to words of limitation, nor so restricted as to mean children. The general intent was, to give the estate to James in the event of John's leaving no descendant. But this intent would be frustrated by the death of a child in whom the estate vested, and who had died without issue in the lifetime of John; for after a vested estate in fee, no further limitation can take effect, but [*177] by way of executory devise. Where two contingent remainders in fee, depend on the same particular estate, both cannot take effect, as both depend on the same contingency, according to the happening of which, the one is to take effect in exclusion of the other. This is the familiar case of a single contingency with a double aspect. But the construction contended for, contemplates two distinct contingencies—the birth of issue, in whom the estate would vest in the lifetime of John, and the extinction of such issue, on which it would go over at his death. But the latter could, as I have said, take place only by holding the limitation to James to be an executory devise, which we cannot do, as there is a preceding freehold, on which it may depend. As, then, we have two contingent remainders, which depend on one contingency, and both cannot take effect, there is no way to give effect to the general inten-

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tion of the testator, but to fix the time for the happening of the contingency at the expiration of the particular estate. The consequence is, I am bound to pronounce that the plaintiffs are barred.

Judgment reversed.

Cited by Counsel, 1 Wh. 150; 3 Wh. 212, 536; 5 Wh. 63; 3 R. 67; 5 R. 147; 7 W. & S. 239, 291; 2 Barr, 279; 8 Barr, 126; 1 H. 81; 6 H. 75; 2 C. 128; 4 C. 97; 6 C. 171; 7 C. 96; 11 C. 355; 12 C. 118; 1 Wr. 11, 490; 6 S. 481; 21 S. 390; 27 S. 164; 32 S. 126; 10 N. 41; 13 W. N. C. 296.

Cited by the Court, 3 Penn. R. 80; 1 Par. 147; 9 Barr, 460; 2 C. 339; 1 Wr. 21.

Cited by Lower Court, 4 W. N. C. 439.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Sholly *against* Diller.

IN ERROR.

The probate of a paper, purporting to be a will, before the register, indorsed thereon, may be read in evidence on the trial of an issue of *devisavit vel non*, directed thereon by the Register's Court.

ERROR to the Court of Common Pleas of *Cumberland* county.

This was a feigned issue of *devisavit vel non*, to try the validity of a paper writing, purporting to be the last will and testament of Ludwick Bucher, deceased. The plaintiff in error was defendant below.

The plaintiff offered in evidence the paper writing purporting to be the will of the said Ludwick Bucher, deceased, with the probate indorsed, taken by the register, and upon which letters had issued before the appeal to the Register's Court. This was objected to by the defendant's counsel on the ground,

"1. That this was a feigned issue, and any evidence before the register was *ex parte*, and could not authorize the paper to be read.

"2. That the subscribing witnesses must be called.

"3. That the issue was directed as to the validity of the will, and was not collateral."

The objection was overruled, the testimony admitted, and exception taken by the defendant.

The paper and probate were then read, and the defendant's *witnesses were afterwards called and examined, and then [*178] the plaintiff examined the witnesses to the will.

The plaintiff then requested that the probate might go out with the paper writing to the jury. This was objected to by the

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defendant, but allowed by the court; to which the defendant's counsel excepted. The jury found a verdict for the plaintiff below.

The errors now assigned, were the matters contained in the two bills of exceptions.

Carothers, for the plaintiff in error.—The witnesses were in court; these were *ex parte* depositions, and there was nothing to take them out of the general rule. 12 Serg. & Rawle, 281, is directly in point. At all events the depositions ought not to have gone out. 5 Binn. 240, 241.

Metzger and Alexander, contra.—Even if the depositions were improper, the error is cured by afterwards calling the witnesses themselves. The depositions are proper to corroborate the parol evidence of the same witnesses.

The opinion of the court (ROGERS, J., dissenting,) was delivered by

GIBSON, C. J.—Wills are proved here, neither in common form, by the oath of the executor, nor in solemn form, *per testes*, on notice to the parties; but in an intermediate manner, by witnesses without notice to any one. Proof in solemn form is seldom made, even in England, unless at the instance of a party opposed to the will, and I feel confident there never has been an instance of it in Pennsylvania. Where the will is contested, which is done by a *caveat*, and no issue is directed, the matter is determined by the Register's Court, the depositions being made part of the proceedings. Where there is no dispute before the register, the depositions are indorsed on the will, which is then taken to be proved without any formal sentence, the indorsement of the proof being called the probate. In the case at bar, probate was thus made; and on the trial of an issue from the Register's Court, the will, with the probate indorsed, was permitted to go to the jury, the witnesses themselves being subsequently examined. The objection is to the probate, which is alleged to be not only a deposition, which cannot be admitted where the witness may be had, but a deposition *ex parte*. It is, however, not an ordinary deposition, but proof taken in the cause, and in the course of a judicial proceeding, of which, it was held, in *Ottinger v. Ottinger*, 17 Serg. & Rawle, 142, all parties in interest are bound to take notice. All then, that is necessary to secure those parties from the possibility of injury, is to give them an opportunity to cross-examine the witnesses at the trial. Even the want of this, would not be an objection if the witnesses were dead, as was determined in the case just

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cited. I perceive no difference in this respect between the probate of a will, and the probate of a deed under the recording acts. It is true, the latter is necessarily offered only in [*179] a collateral proceeding, and here the probate was offered on appeal from the probate itself. But it by no means follows, because the proceeding on appeal is *de novo*, that so must be the proof of every contested fact. On appeals to this court, we have invariably received depositions taken below ; and I see no reason for a different practice in respect to an appeal from the register. Had the Register's Court decided the matter, it would, undoubtedly, have received the proof taken by the register, subject to explanation, by a further examination ; and if so, I cannot imagine a reason for a different rule of proof before a tribunal to which that court had referred the determination of the facts. It is supposed that the point before us was decided in *Cowden v. Reynolds*, 12 Serg. & Rawle, 281. There, the plaintiff offered the will to the jury with the probate indorsed ; and the court would not suffer the will to be read without proof of execution. Now, in relation to this, the Chief Justice said, that the plaintiff was entitled to lay the will before the jury, without any evidence of execution ; not, indeed, as proof of its own validity, but to let them know what they were to try. In other words, that the court should not arrogate to itself the very fact which the jury was empanelled to determine. He did not put the matter on any supposed effect of the probate as proof of execution, but decided, that the will might be read in the absence of all proof ; consequently, the decision of the present point was unnecessary. There is not one word said as to the competency of the probate. In the case of deeds, mistakes similar to that in *Cowden v. Reynolds*, had been made on the issue of *non est factum*, for want of discriminating between evidence to the court, preliminary to introducing the instrument collaterally, and evidence to the jury of the very fact in issue ; and in those cases, we held, in the same way, that the deed ought to go to the jury, without proof in the first instance.

I know of no question more unimportant in its consequences than this. If the witness persist in proving the fact, the force of his evidence cannot be increased by his evidence before the register ; and should he retract, he will do so with a certainty, that that evidence will then be introduced to impeach him. It is, therefore, of little consequence, when the probate is read ; or, where the witness is consistent, whether it be read at all.

If, then, the probate were properly admitted to the jury, it seems to be such a document as they might take out with them. But were that otherwise, it is not a ground to disturb the verdict, as was intimated in *Alexander v. Jameson*, 5 Binn. 238, and

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directly decided in *M'Cully v. Barr*, 17 Serg. & Rawle, 445, at the last term at Pittsburg.

Judgment affirmed.

Cited by Counsel, 1 Penn. R. 313; 5 R. 81; 5 H. 208; 5 Wr. 163; 6 S. 372.

Cited by the Court, 4 W. 168.

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*[CHAMBERSBURG, NOVEMBER 1, 1828.]

Muntorf and Another *against* Muntorf.

IN ERROR.

In Pennsylvania, an executor plaintiff is bound to pay costs to the defendant in case of nonsuit, or verdict for the defendant, as well where he necessarily sues in his representative character, as where the cause of action arises after the death of the testator.

But costs accrued since the testator's death, are not a lien on his lands as against the purchaser.

ERROR to the Court of Common Pleas of *Adams* county.

Stevens, for the plaintiff in error.

Carothers, *contra*.

The opinion of the court was delivered by

ROGERS, J.—Entertaining the opinion we do, it will be unnecessary to consider all the points which have been pressed upon us in the arguments of the counsel. This was an action of ejectment, to recover a tract of land of one hundred and eleven acres and twenty-two perches, in the possession of the defendant. The property in question, was part of the estate of John Muntorf, the elder, and as such, descended to his heirs; and was taken at the appraisement by John Muntorf, who entered into a recognisance on the 17th of January, 1823, to pay to the respective heirs their shares of the appraised value. On the same day John Muntorf assigned the property to Elizabeth and Catharine Muntorf, at an advanced price of one hundred and twenty-one dollars. Their agreement was duly proved the 6th of October, 1825, and recorded the 2d of November, 1825. Some part, although not all the purchase-money has been paid, and they are now in possession, and have been since the purchase. It appeared in evidence, that to April Term, 1821, John Weiman, Esq., and Herman Weiman, administrators of John Muntorf, deceased, brought an action of debt on a book account against Henry Muntorf. The case was arbitrated, and the arbitrators reported, no cause of action, and that the plaintiffs pay all costs of suit. The plaintiffs appealed, and on the 13th of

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November, 1823, a verdict was rendered for the defendant. A *feri facias* was issued for costs to January Term, 1824. There was a levy and condemnation of the land, and John Muntorf became the purchaser at the sale by the sheriff, and, on the 3d of August, 1826, a deed for the premises was acknowledged in open court to John Muntorf, who, by deed, on the 3d of November, 1826, conveyed the property to Henry Muntorf. This ejectment is brought by Henry Muntorf, to recover the possession from Elizabeth and *John Muntorf, tenants in possession. These are all the facts which are material to [*181] the point on which this cause turns.

By the statute, 23 Hen. 8, ch. 15, which has been extended to Pennsylvania, it was enacted, that in trespass upon the statute 5 Richard 2, debt, covenant, detinue, account, trespass on the case, or upon any statute for an offence, or wrong personal, immediately supposed to be done to the plaintiff, if the plaintiff, after the appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judge or judges of the court, where such action shall be commenced or sued; and shall have such process and execution for the recovery of the same against the plaintiff, as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff.

This statute, although extended to this state, has received a different construction from that given in England. In the latter country, although executors and administrators are not particularly excepted out of the statute 23 Hen. 8, ch. 15, yet, as that statute only relates to contracts (as is there said,) made with, or wrongs done to the plaintiff, it has been uniformly holden, that they are not liable for costs, upon a nonsuit or verdict, where they necessarily sue in their representative characters; as, upon a contract entered into with the testator or intestate, or for a wrong done in his lifetime. But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as, upon a contract, express or implied, or in trover, for a conversion after the death of the testator or intestate. *Vide* 2 Tidd, 892, 893; 2 Bac. Ab. 46, 47; 3 Com. Dig. 241; 1 Salk. 207; Sager on Costs, 94.

Although this be the undoubted law in England, yet the construction has been uniformly held to be otherwise in Pennsylvania, and for a superior reason. There is an obvious justice, that a man against whom a vexatious suit has been brought, should recover his costs, and it is nothing to him on whom the

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costs fall, whether on the estate, or the executor personally. In all cases, the defendant recovers costs as well against executors who necessarily sue in their representative character, as when the cause of action arises after the death of the testator or intestate. The same principle extends to trustees for insolvents: the fund that is to be benefited by the recovery, bears the costs in case of failure. If the executor or administrator abuses his trust, there is full power lodged in the Orphans' Court to correct the abuse. In such case the claim of costs is stricken out of the administration account, and made to fall, as is just, on the administrator, or executor, personally. The distinction which prevails in England, has not obtained in this state; and I have no doubt, there are some titles held under the law as now [*182] expounded. *It is a question of construction, and the practice is very general, to give costs without regard to the subtle distinction in England, and there would be danger, if we were so inclined, (as we are not,) to disturb it. And this does not interfere with the case of *Musser and others, Administrators of Charles, v. Good and another*, 11 Serg. & Rawle, 247. That was an attempt to charge the administrator personally, with payment of costs, where the executors had discontinued the suit.

But considering this point as settled, another question will arise, whether costs, which have accrued since the testator's death, are a lien on the lands in the hands of a purchaser; and the court are of opinion they are not. It has been repeatedly decided, that lands are assets *sub modo* in the hands of the administrator, for the payment of debts; but whether they can be taken for costs which have accrued since the testator's decease, has never yet been decided, nor is it intended to give any opinion upon this point. We, however, adjudge, that costs are not a lien on the land, although debts are, and we take the distinction between debts and costs. It would be extremely inconvenient to say, that costs, which have arisen since the testator's death, or disposal of the property, should be a lien on the lands, so as to subject them to sale in the hands of a purchaser. A purchaser has the means of ascertaining the debts against an estate with some certainty, but he would have no mode of guarding himself against costs which were created after his purchase. The doctrine of the plaintiff's counsel would leave him at the mercy of the administrator or executor.

Cited by Counsel, 1 Wh. 275; 7 W. 562; 8 W. 74; 1 H. 532; 7 C. 313.

Approved and followed in 8 W. & S. 380; and again approved, 7 Barr, 136, and yet in 11 H. 472, it is said, "this case is no authority for the liability of an administrator for costs."

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Lease and Another *against* Asper.

IN ERROR.

J. L. being in custody, gave bond with surety, conditioned to appear, and "make application for the benefit of the several acts of assembly, and for the relief of insolvent debtors, and surrender himself to the jail of the county of C., in case, on his said application, the court should remand him to custody, and that he should do all things required by law to procure his discharge." Held, that this condition imposed no harder terms than the bond required by the act, and was substantially in conformity with the law.

Parol evidence is not admissible to show, that the Court of Common Pleas ought to have discharged a petitioner, instead of rejecting his petition.

ERROR to the Court of Common Pleas of *Cumberland* county.
The plaintiffs in error were defendants below.

Watts, for the plaintiffs in error.
Alexander and *Metzgar*, *contra*.

*The opinion of the court was delivered by

ROGERS, J.—This is a suit brought upon a statutory [*183] obligation, given by the defendants to the plaintiff. George Asper issued a *capias ad satisfaciendum* on a judgment rendered against Jacob Lease; and for the purpose of obtaining his discharge, Lease executed the bond in question, with John Meixwell as his surety, with condition underwritten:—

"That the said Jacob Lease shall be, and appear, &c., and make application for the benefit of the several acts of assembly, and for relief of insolvent debtors, and surrender himself to the jail of the county of Cumberland, in case, on his said application, the court should remand him to custody, and that he should do all things required by law to procure his discharge."

It is contended, that there is no authority to take a bond in this form: That the terms of the bond vary from the act of assembly of the 28th of March, 1820. When we consider, that by the execution of the bond, the defendants procured Lease's discharge from custody, and that the plaintiff was deprived of the highest remedy known to the law, and that, without the agency, and in most cases, without the knowledge of the plaintiff, the justice of the case does not require that we should be very astute in finding objections to the form of the instrument. It is the bond of the defendants, given in case of Lease, approved of by a judge in vacation, over which the plaintiff had

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no control. It purports, and is intended to be, in compliance with the directions of the act of assembly. The object was well understood by the parties, and there is no hardship to award a forfeiture of the bond, to require a substantial compliance with the directions of the act of assembly. Had Jacob Lease surrendered himself into custody, when the court refused to discharge him, he would have saved his bond. Although the terms are used in the bond, that he would surrender himself, if remanded by the court, a voluntary surrender would have been a substantial compliance with the engagement, which looks to, and is made in reference to the requisitions of the statute. If the bond be a substantial compliance with the act of assembly, binding the defendant to no harder conditions than the act of assembly, the bond is not void; and this is in accordance with the case of *Greenfield and others v. Yeates and others*, decided at this term. *Beacom and others v. Holmes*, 13 Serg. & Rawle, 190, was the case of a bond, as the court said, given under confinement, and to relieve the debtor from duress, illegally required. The illegality consisted in requiring the defendant to give bond for all the debts, when by law, he was only bound to give bond in an amount sufficient to cover the debt on which he was arrested. So also in *M'Kee v. Stannard*, 14 Serg. & Rawle, 380, the defendants were bound to harder conditions than were required by the act of assembly. In this case, Jacob Lease is not bound to harder conditions; on the contrary, the conditions [*184] of the *bond are substantially in accordance with the act of assembly, which is all that is required in the cases decided at the present and preceding terms.

After the admission of the bond, the defendants offered to prove, that the proper affidavit, as printed in the petition, was made by Lease before the witness, who was the justice of the peace; and that by mistake, he put his name and attestation below the form of the assignment. They also offered to prove that the petition and application were rejected on the ground of the alleged defect of the affidavit, and that was the only objection made to his discharge. The evidence offered was rejected, on the ground, that the decree of the court, rejecting the petition, was final and conclusive. That the decree of a court of competent jurisdiction is conclusive, and cannot be re-examined in a collateral action, is too well settled to be now the subject of dispute. It would be useless labour, to cite authorities to prove the general position. In a late case, *Sheetz v. Hawk et al.*, 14 Serg. & Rawle, 173, the Supreme Court decided, "That the record of the discharge of an insolvent debtor is conclusive, as to the fact of his having complied with all things required by law, to entitle him to his discharge, and cannot be inquired into

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in a collateral action." I cannot see a distinction between the cases; the principle is the same in each. Had the insolvent submitted the same facts to the Court of Common Pleas, when applying for the benefit of the act of assembly, it may be, he would have been entitled to his discharge. But this he omitted to do, and having failed in his proof, the propriety of the decree of a court having jurisdiction over the whole case, is not now open to inquiry. And this comports with the peace of society and all the analogies of law.

On the whole case, we are of opinion, that the plaintiff is entitled to recover, and that the judgment be affirmed.

Judgment affirmed.

Cited by Counsel, 14 Wright, 198; 3 S. 200.

*[CHAMBERSBURG, NOVEMBER 1, 1828.]

[*185]

Morrow, for the Use of the Heirs of Isett, *against* Brenizer.

IN ERROR.

Where a testator orders his property to be sold by his executors, after the decease of his wife, and the moneys arising therefrom to be divided among his children, and empowers them to rent the premises, if they cannot sell, a levy and sale of a share of the real estate, under a judgment against one of the children, does not pass any interest of such child therein.

An action for a legacy lies against the executor, in his individual capacity; so, of an action for a distributive share against an administrator.

Still, the defendant is entitled to a refunding bond.

An executor is chargeable as such, only on the engagement or covenant of his testator.

It seems, an executor is within the purview of the acts to compel assignees to settle their accounts, empowering the court to displace a negligent trustee, and appoint another in his stead.

ERROR to the Court of Common Pleas of *Cumberland* county.

Assumpsit for money had and received. The plaintiffs in error were plaintiffs below.

In the court below, a special verdict was found, on which, that court gave judgment for the defendant.

John Brenizer, in his lifetime, and at his death, was seised in fee of a tract of land, in Allen township, Cumberland county, containing 215 acres; and made his will, dated the 25th of July, 1805, which was duly proved and registered in Cumberland county, on the 5th of July, 1816, whereof the defendant was appointed executor, and took upon himself the execution thereof. The said testator left eight children and heirs, of whom the

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defendant, and George Brenizer, were two. The said George having executed to Henry Isett a judgment note for two thousand dollars, dated the 20th of June, 1814, judgment was thereupon confessed, and entered of record, in the said court, on the 1st of July, 1817, No. 263 of April Term, 1817, the balance of the debt and interest then being fourteen hundred and two dollars, and sixty-two cents. A *fiery facias* was issued thereon, No. 41 of April Term, 1818; in pursuance whereof, Andrew Mitchell, Esq., then sheriff of the said county, levied on the one undivided eighth part of the said land, and of another tract of seven acres, adjoining the same, as the property of the said George Brenizer; an inquisition was held thereon, and the property condemned. A writ of *pluries venditioni exponas* issued, No. 132, of August Term, 1819, and the said property was sold by the said sheriff to the plaintiffs, Morrow and Fleming, executors, &c., in trust, for the heirs of Henry Isett, deceased. A deed was made, dated the 7th of August, 1819, and duly acknowledged on the 3d of November, 1819.

[*186] *On the 9th of September, 1816, the defendant, David Brenizer, paid George Brenizer six hundred dollars, and took his receipt, in the following words: "Received, September 9th, 1816, of David Brenizer, executor of the estate of John Brenizer, deceased, six hundred dollars, on account of my legacy, or whatever may lawfully come to my share, after the said David Brenizer, executor, make sale of all the real and personal estate of my father, John Brenizer, deceased, with lawful interest from the date above written.

"GEORGE BRENIER."

The following notice was served by the defendant on Sheriff Mitchell, on the day of its date, and posted up on the court house wall, viz.:

"Sir,—Take notice that the land which you have advertised for sale, as the property of George Brenizer, does not belong to the said George, but is part of the estate of my father, John Brenizer, deceased, of which I am executor; and that the said George has no claim in the said land, being only entitled to a legacy in money, under the will of his father, of which I paid him six hundred dollars on account.

"DAVID BRENIER."

"To A. Mitchell, Esq., Sheriff of Cumberland county.

"August 3, 1818."

On the 11th of November, 1819, the defendant entered into articles of agreement with John Wist, for the sale of two hun-

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dred and fifteen acres; and the said Wist has paid the hand money and gales hitherto falling due, to the defendant, agreeably to the said articles. The defendant has settled an account of his administration of the estate of the testator, and received the moneys therein charged to him, and paid out the moneys credited to him.

The plaintiffs are the executors of Henry Isett, who died after the levy, and before the sale. These questions, therefore, arise for decision, viz.:

1. Was the said judgment a lien on the said George Brenizer's interest in the said land? Or did the said levy, and sheriff's sale, transfer any right to the plaintiffs?

2. Can a suit, under the circumstances stated, be supported at all; or, if it can, can it be supported in the names of the present plaintiffs, or must the suit be in the name of the said George Brenizer, for the use, &c.?

3. What is the effect of the said receipt, for six hundred dollars, on the rights of the parties?

If the court shall be of opinion with the plaintiffs, judgment to be entered for them, for such sum as the court shall order; if for the defendant, judgment to be entered for the defendant. The papers herein referred to, to be considered as parts of this special verdict. The said Isett and his executors resided in Greensburg, Pennsylvania, at the times mentioned. Out of the personal estate, the defendant, as the administrator of his sister Barbara, retained *fifty pounds, the amount of a pecuniary legacy to her; and also, fifty pounds for her ser- [*187] vices, agreed to be due to her by the testator, on his death bed; which sums are not credited to the defendant, in his administration account of the estate of John Brenizer, deceased, and which sums were retained by the defendant, as administrator of the said Barbara, who died about the 6th of December, 1820.

The court below gave the following opinion:

"The exception to the form of the suit is fatal. The claim for a legacy is not *ex contractu*. There is, therefore, no implied promise to pay. It is not founded on any kind of contract. *Walker's Executors v. Wiley and Wife*, 12 Serg. & Rawle, 96; *Wilson v. Wilson*, 3 Binn. 557. It is a good consideration for a promise; but here, no express promise is alleged.

"The defendant sold the land exclusively under the powers in the will. He received the money under the will exclusively, as executor of the estate. He held it for the uses of the estate, to be applied and appropriated under the laws of the commonwealth, and the provisions of the will. The will is the title by

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which the plaintiffs claim the money. If their claim is not good, under the will, they have none other. The defendant, therefore, has a right to resist any suit against him as executor. As executor, he might have pleaded in abatement, the want of a refunding bond. The plaintiff, by shifting the liability, cannot deprive him of this right. As we deem this point conclusive, it is unnecessary to examine any other."

Extract from the will.—"As to such worldly estate, &c. As soon as convenient, after my decease, all my property, real and personal, shall be sold at public sale by my executors, herein-after named, and the moneys arising therefrom, to be equally divided among my nine children, excepting Barbara is to have fifty pounds more than any of the rest of my children; to be paid to her, by my executors, out of the first money that comes to hand arising from my estate. And, as I have already advanced to John fifty pounds for which he has given me a bond, it is my will, that my son John shall not receive any more moneys arising from my estate, until each of my other children shall be made equal with him, &c. Out of the moneys arising from my personal estate, and hand money of the plantation, all my children shall be made equal, excepting Barbara's fifty pounds, over and above any of the rest of my children. And all the sums charged against my children in my book, to be settled out of the first moneys arising out of my estate, still reserving Barbara's fifty pounds. After all are made equal, the residue of the purchase-money of my plantation to be equally divided among my nine children, to wit, &c., to them, their heirs and assigns forever, to be paid to them as hereinafter directed.

"And it is my will, that my executors shall have full power to give a clear and indisputable title to the purchaser, or purchasers, of my *lands. And, if my executors should [*188] not be able to sell my lands, shortly after my decease, it is my will, that they shall rent the place to the best advantage, until an opportunity offers. Michael and David Brenizer to be executors."

Alexander, for the plaintiff in error.

Carothers, *contra*.

The opinion of the court (HUSTON, J., dissenting,) was delivered by

GIBSON, C. J.—A majority of the court are for adhering to the decision in *Allison v. Wilson's Executors*, 13 Serg. & Rawle, 330, without absolutely assenting to the propriety of it on original grounds. For myself, I cannot bring my mind to doubt its propriety on any ground. The opinion of the court was not, as

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has been supposed, rested exclusively on the authority of *Craig v. Leslie*, 3 Wheat. 563. An intimate knowledge of the eminent men with whom I was associated, enables me to say, the result would have been the same, had that case never been decided. They were too familiar with the principle on which it depends, to let it escape them; and too sensible of the danger to be apprehended from a contempt of precedent, to disregard it. That case was particularly noticed by the judge who delivered the opinion of the court; not as absolutely ruling the cause, but, as enabling him to refer to the learning of the subject, without the appearance of a display. There has been no attempt here to contest the positions of Judge Washington; and the attempt to distinguish between the case of a volunteer, and that of a purchaser, has failed. A purchaser from a volunteer, acquires no additional equity; his is the case of a volunteer still. And this is emphatically the case of a purchaser at sheriff's sale, who, by the express provisions of the act of assembly, acquires nothing but the interest of the debtor. This ground failing, the argument is necessarily reduced to a dependence on our peculiar usages; by which it is supposed that a judgment is a lien on every possible interest in land, whether immediate or remote, actual or contingent. This takes for granted, that the legatee had, in fact, an interest in the land. I shall attempt to show, that, according to the apprehension of even simple and unassisted reason, he had not. But, it is proper to remark, that both the major and the minor are untrue. The interest of a mortgagee, judgment creditor, owner of a legacy charged on land, creditor of an intestate estate, mechanic, or material man, or of a preferred creditor, under an assignment to trustees, (to each of whom the land is debtor,) is not the subject of judgment and execution. Nothing is such but an immediate interest; as, for instance, the estate of a tenant by the curtesy initiate; or of a widow, whose interest is put, by the intestate acts on the footing of a rent charge. The only thing peculiar to a judgment with us, is, that it binds an equitable, or even an inchoate, interest; but that interest must be an estate in the land.

*It will not be disputed, that a father may, if he thinks proper, bequeath to his children the value of his land in money, without giving them an estate in the land itself. Now, he does bequeath it thus, when he devises the land to the executors, with directions to sell it, and distribute the price among his children. Who can say, that he resorted to this for the sake of convenience, as regards partition, and not for the very purpose of providing for the children, without exposing his bounty to interception, by their creditors? Where such is the object, I know

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of no rule or policy of law to forbid it. He gives his land to trustees, and the objects of his bounty are expressly to have no estate in the land, but an interest in the execution of the trust. The natural and strict import of the words is, that the children are to have money, and not land; so that their interest is not, as stated at the bar, changed from land to money, by the magic of a fiction, and contrary to the dictates of common sense. On the contrary, it requires a fiction to make it anything else than money; and we, accordingly, find the law invokes the aid of such a fiction, to create a resulting trust, in respect of the surplus, after the objects of the trust have been satisfied. As the equitable estate in this, is undisposed of by the will, it is held to be a resulting interest, which descends to the heir, not as money, but as land. But this fiction does not hold, even in favour of the heir, where the whole estate, legal and equitable, passes by the will; and, consequently, where the testator himself has determined the character of the bequest to subserve some necessary purpose, which he had in view, I deem it unnecessary to resort to authority, to show, that in such a case, there is no resulting trust to the heir. But, the character of money is indelibly impressed, where the object is, equality of distribution; and for this plain reason, that it cannot be effected while the estate is land. As, then, the testator ordered his land to be turned into money, that he might give his estate equally among his children, it necessarily could pass only by the will, and, consequently, as money. This appears to me a satisfactory answer to the argument, that, as nothing was given to the children but what they would have inherited, they necessarily took by descent. It was necessary, to the purposes of the will, that the quality of their interest should be changed; and they could, therefore, take only by purchase. They might, indeed, have elected to take the land itself, instead of the price of it. But their right in this respect, is a consequence of their power to control the event, being the only parties beneficially interested. As they can produce the same result, by purchasing at the sale of the trustees, chancery considers them as having an equitable estate in the land, and directs the trustees to convey the title, the moment they signify an intention to call for a conveyance; an actual sale being dispensed with, as unnecessary formality. But, even then, an estate in the land is not vested by descent, but by an act of their own, which is equivalent to a purchase. The [*190] fiction may be said to exist, where the party *beneficially interested has an estate in the land, previous to the period of conversion. But, where the title has passed immediately from the testator to the trustees, the party to be benefited has no estate in the *corpus* of the devise, either as land or

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money, but only in the execution of the trust, because he has no title to go into equity for anything else ; at least, before he has elected to be treated as a purchaser. Previous to the act of 1792, by which the devise of a naked power to sell vests the estate, there might have been such a case ; but, even the English courts begin to consider the descent as broken, by a naked power to sell, inasmuch as the vendee is in by the devise.

If, then, in a devise to sell, and distribute the price, there is a plain inartificial intent to give an interest merely personal, what beneficial purpose could we effect, by declaring it to be an estate in the land ? That equality of distribution among creditors, is more consistent with natural justice, is manifest, from the eagerness of every chancellor to treat the proceeds of land sold, for the payment of debts, as equitable assets. As regards the case before us, there certainly would be no natural justice, in giving a preference to the creditor who first obtained a judgment against the legatee. As it is, he will come in *pari passu*, under the intestate acts, instead of sweeping the whole from the other creditors. It is said, the interest of the children, if personal, would be exempt from execution. But, so is the interest of a mortgagee, and every other sort of creditor, whose debt is secured by a lien ; their interest can be reached only through the person. It has been objected, that recourse to the person might be ineffectual, as the legatee himself could not compel the executor to perform the trust. This would be an imposing argument, did the law depend on our discretion. But, it seems to me, the case of an executor is within the purview of the acts, to compel assignees to settle their accounts, which empower the court to displace a negligent trustee, and appoint another in his stead. There would, therefore, be no peculiar expediency, even here, in subjecting the interest of the legatee to execution. On the other hand, in addition to the inconvenience inseparable from entails, and executory devises, as well as those other intricate and perplexing limitations, of which real property alone is susceptible, there would be substantial injustice, in attributing to such a legacy the qualities of land, and thus subjecting it to curtesy and dower, instead of giving the husband or wife an absolute ownership ; and particularly, in excluding brothers and sisters of the half blood from the succession. Other mischiefs would undoubtedly be produced ; but these are sufficient, to demonstrate the justice and policy of the decision in *Allison v. Wilson's Executors*, as applicable to devises of this sort, even in Pennsylvania.

Whatever may be our opinion of the fitness and policy of the rule, I submit, that we have no authority to dispense with its obligation. One would think, that, having been firmly established

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by the English court of chancery, previous to the American [*191] *revolution, since recognised by the Supreme Court of the United States, and finally adopted by the concurrent opinion of the judges of the court of the last resort in Pennsylvania, and having in consequence, been relied on (as I know it to have been in more instances than one), by counsel in advising their clients, it ought not to be disturbed now for reasons purely technical, and without its having proved seriously detrimental in practice, which is not pretended. But aside from this. No evil is so pregnant with mischief to the suitors, or inconvenience and difficulty to the judges, as the introduction of a judicial discretion in the adoption or rejection of any part of the law; particularly, the law of real property, which Mr. Justice Blackstone, in his argument in the celebrated case of *Perryn v. Blake*, justly designates as “a fine artificial system, full of unseen connections and nice dependencies;” and of which he truly observes, that he who breaks one link of the chain, endangers the dissolution of the whole. In place of this system, consisting of a regular train of premises and consequences, and possessing all the simplicity, as well as, in a great degree, the certainty of mathematical demonstration, what would we obtain by subjecting it to the crucible here? After a century or two, of judicial bewilderment and individual endurance of the evils consequent on insecurity of titles, we might, perhaps, build up a system of our own; but, that it would be more simple in its structure, consistent in its parts, certain in its conclusions, or useful in practice, may admit of a doubt.

The defence was, however, sustained on exceptions to the form of the action, which it is proper, though not at all necessary to examine.

Granting the action to lie, it was said, that it ought to have been brought in the name of the legatee for the use of the purchaser at sheriff's sale. An action could be sustained, if at all, by the purchaser, only on the ground of his having had an estate in the land, and his consequent ownership of the price of it when turned into money. The promise to be implied from such a consideration, would be to him in his own right, and consequently an action on it would be in his own name.

It is also supposed, that an action could be maintained against the executors only in their representative character. As to this, I take an action for a legacy to be in all respects on a footing with an action for a distributive share of an intestate's estate; and I take it to be a rule subject to no exception, that an executor is chargeable as such, only on the covenant, or engagement of his testator. It is held, that a testator cannot bind his executor, where he has not bound himself; and, on a covenant, that

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the executor should pay ten pounds, it was held, that an action did not lie. Cro. Eliz. 232. The propriety of this decision has been doubted, and with reason, because the testator bound himself, although for the act of another, and on a consideration in his lifetime. This being so, the period of performance was immaterial to the existence of the responsibility. *But, [*192] for rent accruing subsequently to the testator's death, the executor is personally liable; and, if he enter on the demised premises, as by his office he is bound to do, the lessor may charge him both the *debet* and the *detinet*. 1 Salk. 297. In Strohecker v. Grant, 16 Serg. & Rawle, 237, it was determined by this court, that an executor cannot bind the estate by a covenant of warranty. Thus, we see, he is liable as executor only for the contracts of his testator, and cannot covenant, or promise as such, or shelter himself under his representative character, in respect of acts to be done by him. What then is the form of the declaration in an action for a legacy, or a distributive share? There has been no actual promise by the decedent, nor will the law imply one, because there was no duty, or consideration in his lifetime. The promise, or duty, which supports the action, must necessarily, therefore, be the promise or duty of the executor himself. The judgment ought not to be *de bonis testatoris*; for that would subject the land to execution in the hands of the heir, to discharge a legacy, payable out of the personal estate, or a thing bequeathed specifically, to be taken in satisfaction of a general legacy. Of the personalty there could, in the case of an intestacy, be no execution; for before the distributive shares could be ascertained, that would have to be turned into money; so that if the heirs were protected from execution, as they ought to be, a judgment *de bonis intestati*, would produce no other effect than to render the administrator consequentially liable in his individual capacity, by an action on the judgment, suggesting a *devastavit*. Better render him liable at once. But there would be no evidence of *devastavit*, except the return of *nulla bona*; and the action would, therefore, be founded on the absurdity of fixing the administrator with a *devastavit*, for having done what was his duty. The act of withholding what belongs to another, after the purposes of the office have been answered, is the individual wrong of the person so withholding, and seems to be appropriately the subject of an action for money had and received. Still, however, the defendant would be entitled to a refunding bond, which is intended to secure him from injury as well as the creditors. Where a distributive share is recovered in the Orphans' Court, the process is against the person of the administrator; and the legislature has certainly viewed him as answerable in the same way, by enabling the parties in interest

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to make the balance of his account a lien on his land. But the point has already been decided in *Wilson v. Wilson*, 3 Binn. 557, where it was determined, that *assumpsit* for money had and received, lies against an executor in his individual capacity, for a share of the estate undisposed of by the will. If, then, the action is to be maintained on a promise implied from the consideration of indebtedness, it is immaterial in what capacity the money, which is the meritorious cause of the action, came to the defendant's hands.

We are of opinion, that the interest of George Brenizer, under his father's will, did not pass to the plaintiff by the sheriff's [*193] sale; *but, that if it had so passed, an action for the price of the land might have been maintained in the present form. The judgment, therefore, is to be affirmed.

HUSTON, J.—I have not been able to see this matter in the point of view taken by the rest of the court.

I admit the doctrine is established in England and in Virginia, that land devised to be sold, and the price to be paid over to a particular person, is to be taken as personal property; and, that money directed to be laid out in land, is to be taken as land. But, I do not admit, that the whole law on this subject is to be found in *Roper v. Ratcliffe*, 9 Mod. 167, 181; and still less, that it is to be got from *Craig v. Leslie*, 3 Wheat. 563. The desire to give full effect to the statutes against papists may have influenced the first case, though I do not say it did; and it may be, that in the latter, some idea, that the law of Virginia was rigid or illiberal, induced the court to consider the question as an abstract matter of general law, which it was not. I will not foretell what our successors may say of that case, nor say, whether it is right to be more liberal in the construction of English aliens, than they have been to others.

But I believe it to be perfectly immaterial what the law on this subject is in other countries; if it has not been the law here, I see great objections to introducing it. In England, it is adhered to strictly in one case: money devised to be laid out in land, does not go to creditors, unless their debts bind land. In this we need not follow them, for here all debts bind land. It, even there, is not a common law doctrine; it is one depending on the system of conveyancing, of devising peculiar to that country, and not so applicable to this. It seems to me it cannot be adopted to any good purpose, unless where there is a Court of Chancery. It is greatly complex, and in some of its features, inconsistent. It is far from being universal in all cases. To descend to particulars: the rule does not apply where the object for which the sale was to be made ceases. The power to

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sell is then at an end, and lands continue lands. 1 Binn. 528 ; 8 Wheat. 531 ; 6 Johns. Rep. 73 ; 1 Br. Ch. 86. It ceases where the title to the money and the land, come by descent to the same person, for a bill would not lie by a man against himself, to compel a sale.

The rule ceases to exist where the intention is obscure or uncertain. Money devised to be laid out in land, may, by the owner of it, pass by a will not attested to pass lands. *Edwards v. Warwick*, 2 P. Wms. 171. Nay, it may be disposed of by parol. *Ibid.*

The husband shall be tenant by the curtesy of the money of the wife to be laid out in land. 2 Vern. 536 ; 1 P. Wms. 172. But the wife shall not be dowable of the husband's money to be so laid out. This I suppose was because the law was not settled by women.

No act of record is necessary to change its description. An act *in pais*, even the intention to be collected from circumstances will *change it. Length of time alone will do it, and [*194] make it continue what it has continued. *Pultney v. Darlington*, 1 Br. Ch. 210. See this case at large, for though we may not cite it as authority, showing what the law is here, it is perfectly allowable to refer to it to show the confusion and uncertainty attending this branch of the law as it stands in England.

The husband may elect to take it as money against the heir at law of the wife. 1 P. Wms. 172 ; 3 Atk. 254.

The intention to give it as personal estate, though not distinctly expressed, if it can be collected from the will of the person entitled to it, will make it personal. 3 Atk. 254 ; 1 Br. Ch. 236. And, says the chancellor, "I hardly know anything that is not sufficient to show such intention." *Ibid.* If got from the trustees by a decree, it is personal. So, if the trustees pay it to the person entitled, without suit. *Ibid.* The result of all the cases is, that the slightest intention to take it as money, will make it so. *Ibid.*

I might swell the list *ad infinitum*. The amount is, that to keep off all but bond creditors, to favour the heir at law, and to give a tenancy by the curtesy, it is land. For all other purposes, money to be laid out in land, is money. The slightest act, any colour of intention, changes it even against these. Length of time alone will do it. "If," says the chancellor, "it is subject to be laid out as land for fifty years, shall the heir come for it at the end of that term? It would lead to infinite inconvenience." Can the court decide that it is land or money, as a jury may say, appears to have been the intention of the owner?

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But, it is said, the devise to a person and his heirs to sell, breaks the descent to the heir, and he can never claim. This is true, only with great limitations, as will appear from the cases cited above. The power to sell ceases when the object ceases. It ceases when the right to the money and the land unite in the same person. It always ceases where one of the devisees dies, so that the legacy lapses; and so far the heir takes. And where the money to be raised is to go to the heir, the descent is never broken for a moment. *Cook v. Duckenfield*, 2 Atk. 565, 568; 1 Br. Ch. 504, 515. But there are difficulties in the way here which do not exist in England. There, in all cases it descends to one heir at law, (except in case of parceners;) here, it almost always goes to more than one. We have no heir at law, except where only one person stands in the same relation to the deceased. Here, we have no court who can compel a sale by the executor; one heir may ask a sale, another ask to take as land. Which is to prevail, or who decide?

Our only remedy is, to bring an ejectment against the executor, and take the land into possession, if he will not sell; and then those interested may not agree to sell, and a partition follows. We come to this, then, that a person may have a right to land on which he can support an ejectment, nay, a real action, and which then will descend to his heirs; and yet, it can neither [*195] be levied on nor sold. But any legal or equitable interest in lands, tenements, or hereditaments; all possible contingent interests; the right of widows to one-third of land taken at appraisement by children, may be taken in execution and sold. *Humphreys v. Humphreys*, 1 Yeates, 427; *Hurst v. Lithgow*, 2 Yeates, 25; *Shaupe v. Shaupe*, 12 Serg. & Rawle, 9; *Clark v. Campbell and Williamson*; *Wampler v. Eckert*, and *Anderson and McCord v. Nesbit*, all occurred in this court.

In many thousand cases, the children, or some of them, have sold their interest in lands devised to be sold, and the money divided among them. These deeds have always been recorded, and hitherto supposed to pass the right to the land or the money; and the purchasers have sold again, or their creditors have sold by execution. But, by the present doctrine, the deed is unnecessary, and the recording illegal, and a copy from the record no evidence; for a deed of a sale of personal property is not injured by being put on record, but is not helped, even as to the preservation of its contents. A child, entitled to half of a large estate, is in debt; the executor may not choose to sell; the other children, or one of them, may forbid him; the child is imprisoned, and applies for the benefit of the insolvent law; assigns and is discharged; but still the creditor cannot get his money,

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for the assignees cannot compel the executor to sell; and they cannot sell, for there is no right in, or to the land; and yet, they could sell a reversion expectant on lives, or even on an estate tail.

But if the descent is broken, where does it leave the heir? He could not bring an ejectment against the executor refusing to sell. If the executor sells, and applies the money to his own purposes, the right of the heir to recur to the land is gone; the will it is said, destroyed it; but if he had a legacy charged on it, the legatee would be safe. A devisee of half the proceeds then, is worse off for all present and practical purposes, than any devisee of any specific legacy in the will, and, though a child, is less secure.

A man devises lands to be sold, one-half of the proceeds go to his daughter; she marries and has two children, and dies; the husband marries again, and has ten children; one of the first wife's children dies, the land being yet unsold: if land, the brother of the full blood gets all; but being personal estate, he gets one-eleventh, and the rest goes to strangers to the blood under which it comes. This if the husband does not interfere; but on the death of his wife, it is the husband's, and he may give it all to the children of the second marriage, though it is still land; and then they may elect to keep it land; and the legal heirs of the devisee, portionless, see strangers the owners of land which would belong to them but for a fiction of the Court of Chancery in England.

In old settled and rich countries, lands are always improved, and can at all times be sold for a fair price. Here, the reverse is the case. In many parts of this state, a tract of land, which would be *the means of supporting a family, and a valuable estate when that family grows up, would now bring [*196] but a few dollars. One of the children may wish to take such a farm, at its selling price; another says, all must be sold; a third, sell none yet, lands will raise, &c. We have no court to decide or direct. If this court had power to decide, and could form and carry into execution a plan, this court is not that to which it belongs. Fifty-two Registers, or fifty-two Orphans' Courts, scattered over the state, are to adopt the system as they may successively hear of it, and carry it into effect, according to their respective notions of law and equity and public convenience; and by an isolated case, coming once a year before us, we can correct the error in that case; but in this way we can form no system, though we can increase the confusion and inconvenience.

I could pursue this for a week, and every result will produce anything but justice to the family, or convenience to the com-

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munity. The law has been held always, that while it continues land, the child sells its share as land, and the deed is recorded, and the purchaser has the right to the land, if not sold by the executor, or to the money if it is sold. So it has been levied on and sold. It has gone to the assignees of an insolvent debtor who have sold; and no inconvenience has been experienced, or is suggested. The change is made solely to conform to the law of England and Virginia; no matter if it deprives the children of any benefit from the estate of their father, or if it occasions that estate to be transmitted to strangers, or, if it injures creditors, as well as devisees; and it has none of the benefits derived from it in England, where it shuts out a class of creditors, if money is to be turned into land, or lets in all if the land is turned into money.

Judgment affirmed.

Cited by Counsel, 5 R. 139; 1 Wh. 100, 258; 2 Wh. 347, 402; 5 Wh. 115, 560; 6 Wh. 159; 3 W. 336; 7 W. 438; 8 W. 160, 505; 9 W. 146; 3 W. & S. 349, 355; 6 W. & S. 505; 7 W. & S. 294; 6 Barr, 39; 8 Barr, 344; 10 Barr, 131, 512; 1 J. 363; 1 H. 295; 2 H. 445; 3 H. 461, 477; 1 C. 40; Id. 269, 523; 4 C. 20; 7 C. 56, 236; 8 C. 456; 11 C. 106; 2 G. 362; 2 Wright, 142; 1 S. 512; 9 S. 294; 16 S. 503; 20 S. 81; 22 S. 417; 30 S. 202; 4 N. 340; 7 N. 401; s. c. 7 W. N. C. 302; 4 O. 50; 4 O. 605; s. c. 12 W. N. C. 404; 1 W. N. C. 54; 2 W. N. C. 421; 13 W. N. C. 68, 264.

Cited by the Court, 4 R. 44, 184; 2 W. 187, 213; 3 W. 291; 8 W. 423; 4 W. & S. 197; 6 W. & S. 261; 7 W. & S. 25; 9 W. & S. 56; 5 Barr, 511; 7 Barr, 172, 233, 290; 8 Barr, 425; 2 J. 72, 350; 4 H. 265; 6 S. 408; 21 S. 492; 2 N. 354; s. c. 4 W. N. C. 269; 1 O. 45; s. c. 9 W. N. C. 460.

The ruling in this case as to the form of action was questioned in 1 P. & W. 424, GIBSON, C. J., dissenting (see 2 P. & W. 494). In 8 W. 213, the authorities are reviewed, and the law thus stated: "It seems to have been thought in 2 Y. 268, that an action for a legacy could not be brought against an executor individually; but in 5 Binn. 33, it was decided that it might. The declaration in the latter case was a special *assumpsit*, alleging a promise to pay in consideration of assets having come into his hands; but in *Morrow v. Brenizer*, it was decided that *assumpsit* for money had and received would lie against an executor personally for the plaintiff's share of a residuary bequest of personal estate and the proceeds of real estate, in conformity with 3 Binn. 55, in which it was held that *assumpsit* for money had and received lies against an executor in his individual capacity for a share of personal estate undisposed of by will; still, the plaintiff may sue the executor as such, and seek a recovery, in the first instance, *de bonis testatoris*, proceeding afterwards, on the return of *nulla bona*, to obtain an execution *de bonis propriis*, on the ground of a *devastavit*. It is not pretended that he is *obliged* to sue the defendant personally to recover a legacy." The rule seems to be that in all cases of promises, express or implied, made to or by an executor or administrator after the death of the decedent, the action is a personal one: 2 J. 349. But the fact that the executors are sued as such when they should be sued personally does not vitiate the action. The court will regard it as surplusage, and give judgment *de bonis propriis*: 5 Barr, 511.

The main point in the case—the application of the equitable doctrine of conversion—has been followed and extended. Such interest cannot be mortgaged or transferred by the beneficiary: 3 W. 291. Nor can it be attached in the hands of the executor before the event happens on which the power may be executed: 7 Barr, 233; but after that time it seems that a creditor may

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attach the legacies by execution, and compel the executor to sell by a decree in equity: 9 W. & S. 56. One electing to take the land as such takes it as a purchaser: 6 W. & S. 261; 2 J. 72. The principle has been cited as analogous to that whereby spendthrift-son trusts are sustained: 7 W. & S. 25; and see *ante* p. 37: and also as sustaining the decision that a partner's interest in land brought into the concern as stock is not bound by a judgment entered against him individually: 7 Barr, 172; 21 S. 492.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Ritchie against Shannon.

IN ERROR.

Damages for detention, are recoverable in a suit for a penalty, by the party grieved: but it is otherwise in the case of a common informer.

WRIT of error to the Court of Common Pleas of *Cumberland* county.

Debt by John Shannon, the defendant in error and plaintiff below, against William Ritchie, the plaintiff in error, to recover the penalty of fifty dollars, for taking from the said Shannon excessive fees in a suit before the said Ritchie, as a justice of the peace. In *the court below, judgment was rendered [*197] for the plaintiff for fifty dollars, the penalty, with six cents damages, and six cents costs.

Several errors were now assigned, but the only one noticed in the opinion of the court was, that the verdict was defective, it being contended, that there could be no damages for the detention of a penalty.

Penrose, for the plaintiff in error.

Carothers, *contra*.

The opinion of the court was delivered by

GIBSON, C. J.—None of the exceptions merit particular notice, but that which is taken to the form of the verdict. In every sort of action, it has been almost a universal practice to take the verdict in this form, arising no doubt from inattention; and for so very small a matter, we should not be astute to overturn a judgment. Perhaps the maxim *de minimis*, might be applicable to it. Haply, we are relieved from difficulty in this instance, by the decision in *Norris v. Pilmore*, 1 Yeates, 408, where it is shown, that a penalty given to the party grieved, accrues at the commission of the offence; and consequently, that there may be damages for detention; but that it is other-

[Ritchie v. Shannon.]

wise in the case of a common informer, who has no interest before judgment. This decision is well founded in technical reason, and supported beside by good authority. The verdict, therefore, is unexceptionable in substance and in form.

Judgment affirmed.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

King and Another *against* The Bank of Gettysburg.

IN ERROR.

Matters which would induce the court to stay proceedings on the bail bond, are not properly pleadable in bar.

If the defendant, after being arrested and giving bail bond, is discharged by the insolvent act, it is not necessary to enter special bail; the proper course is to enter a common appearance.

In such case, the plaintiff cannot be subjected to delay, because he may enter judgment if there is no appearance, or demand a plea if there is.

Query, whether the mere entry of an attorney's name on the margin of the docket, is a proper appearance in such case?

WRIT of error to the Court of Common Pleas of *Adams* county.

In the Court of Common Pleas of Adams county, a *capias* was issued to November Term, 1825, at the suit of the Bank of Gettysburg, against Henry M. King, in which he was arrested, and together with Edward Kitchen, gave the sheriff a bail bond. The present suit was brought on the bail bond to August Term, [*198] 1826. *The defendants pleaded, that at August Term, 1825, Henry M. King was discharged by the insolvent act, and so it became impossible for them to enter special bail, and surrender him as by the condition they were bound to do, but that the said Henry M. King entered an appearance at the return of the writ. The court below, by consent, heard the whole merits without regard to the pleadings, and decided in favour of the plaintiff.

It appeared, there was an entry of an attorney's name in the docket, on the margin, against the name of the defendant in the original action.

Fuller, for the plaintiffs in error.—The bail is released by the impossibility of surrendering the principal. Filing a narr., &c., is a waiver of bail. 2 Yeates, 387; 4 Binn. 344.

Stevens, contra.—The course was on the return of the writ,
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[King and another v. The Bank of Gettysburg.]

to be, discharged on common bail, or on entering a common appearance. We lost more than a term by the course pursued.

PER CURIAM.—This case comes here in an unusual shape. Matters which would induce a court to stay proceedings on the bail bond, do not constitute a bar, and cannot be pleaded. They constitute a subject of legal discretion, and not of error. But the parties desire our opinion on the question made below, and this presents no difficulty. The material inquiry is, whether the plaintiff was delayed by the want of an appearance. The condition of the bond might have been literally performed, notwithstanding the privilege of the principal. But it would have been useless to enter special bail, as the bail would, at the same instant, have been entitled to an *exoneretur*; and the proper course, therefore, was to enter a common appearance. Whether the name of an attorney in the margin of the docket, without an explicit minute among the docket entries, be such an appearance, it is unnecessary to determine. Granting that it is not, yet the plaintiff lost no advantage by the want of an appearance, but had it in his power to gain one. With an appearance he could, at the second term, have demanded a plea; without one, he could demand judgment. If he was delayed, it was his own fault, and the court should have restrained him from proceeding further on the bail bond.

Judgment reversed.

Cited by Counsel, 2 W. 491; 1 C. 214; 16 S. 266; 11 W. N. C. 82.

Cited by the Court, 1 M. 65.

*[CHAMBERSBURG, NOVEMBER 1, 1828.]

[*199]

Miles *against* Richwine.

IN ERROR.

A constable who has an execution put into his hands against a defendant, cannot discharge such defendant from liability to the plaintiff, by settling an account with him for money transactions heretofore had between them, and passing receipts, no money being actually paid.

WRIT of error to the Court of Common Pleas of *Cumberland* county. The plaintiff in error was defendant below.

The following case was stated for the opinion of the court, the facts therein set forth having been agreed to by the parties, and the same to be considered in the nature of a special verdict, reserving to either party the right to take a writ of error.

[Miles v. Richwine.]

On the 6th of June, 1823, Henry Richwine obtained judgment on the docket of William Ervine, Esq., a justice of the peace, against Richard Miles, for forty-six dollars and sixteen cents, and costs of suit, upon which judgment, on the 29th of December, 1823, an execution issued at the instance of the plaintiff, Henry Richwine, which was directed to John Monks, then constable of the borough of Carlisle. During the time the said execution was in the hands of the said John Monks, to wit: within twenty days after the same had been issued by the said justice, a judgment existed upon the docket of Elisha Doyle, Esq., a justice of the peace, against the said John Monks, upon which an execution issued, directed to the said Richard Miles, who was then also a constable of the borough of Carlisle; and also, at the time the said execution was in the hands of the said John Monks against the said Richard Miles, the said John Monks was indebted to the said Richard Miles, in divers sums of money, which he, the said Richard Miles, had paid for the said John Monks; whereupon, the said John Monks agreed on the — day of —, A. D. 182—, to give the said Richard Miles a receipt in full of the debt, interest, and costs, for which the said execution had issued; and the said John Monks did then, in consideration of his being thus indebted, and liable to pay to the said Richard Miles, execute a receipt in full, to the said Richard Miles, for the amount of debt, interest, and costs, due on the execution of the said Henry Richwine, against the said Richard Miles: That no money was paid by the said Richard Miles to the said John Monks, in satisfaction of the said execution against him, the said Richard Miles: That afterwards, to wit: on the 11th day of February, A. D. 1824, the said John Monks being still indebted to the said Richard Miles for moneys, paid for him, the said John Monks, the said Richard Miles and the said John Monks, entered an amicable action before Elisha Doyle, Esq., and agreed, that all *matters in variance

[*200] between them should be referred to Andrew Boden, Isaac Todd, and John Phillips, Esq., who proceeded to try the matters referred to them, and made an award in favour of the said Richard Miles for seventy-six dollars and seventy-three cents, upon which the said Elisha Doyle, Esq., entered judgment: That in the said settlement, so made by the arbitrators, by an award in favour of the said Richard Miles, as aforesaid, the said John Monks was allowed a credit for the amount of the said receipt, so given as aforesaid, and which he, the said John Monks, claimed to defalk out of the claim of the said Richard Miles against him: That afterwards, to wit: on the 25th day of March, A. D. 1824, the said Richard Miles entered the said judgment so obtained before Elisha Doyle, Esq., upon the docket

[Miles v. Richwine.]

of the Court of Common Pleas of Cumberland county, whereon he caused execution to issue; upon which, the real estate of the said John Monks was levied and sold, and the amount of the said judgment made and paid to the said Richard Miles: That since that time, the said John Monks has taken the benefit of the insolvent laws of this commonwealth.

This suit originated by *scire facias*, issued upon the aforesaid judgment in favour of Henry Richwine, against the said Richard Miles, to show cause why execution should not issue against him, the said Richard Miles, for the amount of debt, interest, and costs of the said judgment; upon which an appeal was entered to the Court of Common Pleas of the said county.

If, upon the facts, the court should be of opinion, that the plaintiff is, without regard to the form of action, entitled to recover, the judgment to be entered for the plaintiff for forty-six dollars sixteen cents, debt, with interest from the 6th of June, 1823, and costs of suit; but if the plaintiff is not entitled to recover, the judgment to be entered for the defendant.

Watts, for the plaintiff in error.—A constable may give a receipt for a debt, and render himself liable, without the money. Even, if actually received, the plaintiff would have nothing to trust to but his personal responsibility. Where constables have mutual executions against each other, they may set them off; because, it would be idle ceremony to receive on the one, and pay back on the other.

Penrose, contra, was stopped by the court.

The opinion of the court was delivered by

GIBSON, C. J.—It is settled, that an officer cannot apply an execution in his hands to the satisfaction of his own debt. In *Codwise v. Field*, 9 Johns. Rep. 263, the coroner having a *capias ad satisfaciendum* against the sheriff, to whom he was indebted, gave him a receipt in full, and engaged to settle the amount with the plaintiff, but failed to do so; and it was held, that this arrangement did not discharge the execution, actual payment alone being competent to produce that effect. So, in the *Bank of Orange v. Wakeman*, 1 Cowen, 46, where a sheriff's deputy took the defendant's *negotiable note, gave a receipt, [*201] and returned the execution, satisfied; it was determined that the defendant was still liable. As regards the debt due by Monks to Miles, on his own right, these cases are exactly in point. But the case of two constables agreeing to set off executions in their hands, against each other, is clearly within the principles established by them; inasmuch as such an arrange-

[Miles v. Richwine.]

ment would substitute the officer for the defendant. It might not, therefore, be an idle ceremony, as it has been called at the bar, to enforce the payment of money on the one execution, to have it paid back the next moment on the other. If one of the defendants were insolvent, and the other not, the set-off would effect an injurious change of liability, by substituting an insolvent constable for a solvent defendant; and so, *vice versa*. To avoid this, and other mischiefs, the law will not endure the mingling of private transactions with official duties. Had Monks collected the money on the plaintiff's execution, he might, no doubt, have embezzled it; but he might also have proved faithful to his trust; and in the worst event, the plaintiff could have been reduced only to the situation in which the attempted arrangement, had it been successful, would have left him. Miles, therefore, cannot be permitted to obtain his debt from Monks, and at the same time, pay a judgment creditor, at the expense of the plaintiff.

Judgment affirmed.

Cited by Counsel, 1 W. & S. 229; 5 W. & S. 512; 10 Barr, 343; 12 C. 97; 1 Wright, 325.

Cited by the Court, 3 W. 362; 7 W. 63; 2 W. & S. 389; 10 Barr, 461.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Shoemaker *against* Nesbit.

IN ERROR.

If a court-martial, *bona fide*, convicts a person not subject to militia duty, of an offence within its jurisdiction, as for non-attendance at training, neither the members, nor the officer executing their sentence, are liable in trespass.

If they act *mala fide*, they would be liable as trespassers, *ab initio*.

Where an act of assembly gives treble costs to the defendant, the English rule on this subject does not prevail, but the defendant is allowed three times the usual costs, with this restriction, that the fees of the officers are not to be trebled, where they are not regularly and usually payable by the defendants.

WRIT of error to the court of Common Pleas of Perry county.

The plaintiff in error was plaintiff below, in trespass *vi et armis*, in which the jury gave a verdict for the defendant, and the court entered judgment with treble costs.

The charge of the court below to the jury, which the plaintiff excepted to, states the points of law arising there, and was as follows:—

Charge of the court.—“We are of opinion, if the evidence is true, that the court of appeal was legally constituted, and had

[Shoemaker v. Nesbit.]

*jurisdiction of the case of Samuel Shoemaker. His name appearing on the roll of the company, being regularly noted as an absentee, and his name duly certified to the court of appeal, conformably to the provisions of the acts of assembly, notice of the appeal being given, and the court not having remitted the fine, but certified the same to Captain Nesbit, and he having issued his warrant, we say, upon these facts, if proved to the jury, an action of trespass could not be sustained against the captain. It is immaterial whether Shoemaker was in fact, and in truth, a regular member of the company or not. His name being on the roll, and regularly returned on oath to the court of appeal, their refusal to remit his fines, and having duly certified their proceedings to the captain, was sufficient authority for him to issue his warrant. The court of appeal had jurisdiction of the offence. The captain was bound to carry their sentence into effect. His process was regular; although it might have been erroneous, trespass would not necessarily be sustained. What was the captain to do? The fine regularly imposed, although erroneous, could not be released by the captain. It would overthrow the whole militia system, if captains of companies were liable in trespass and to vindictive damages, in all cases of error before courts of appeal. The plaintiff is not without remedy. If fraud or deceit be practised upon him, no doubt, an action on the case would lie for falsely enrolling an individual in a company, against a captain, or any other officer who might practise it.

“You must decide facts. If they are as we state them, and they are not controverted, we think the defendant is entitled to your verdict.”

Errors assigned:—

“1. The court erred in charging the jury, that an action of trespass would not lie against a militia captain, by a person who had been improperly enrolled in his company, for acts done in pursuance of a warrant issued by him for a fine imposed by a court of appeal; but that the only remedy in such case, for such a person, was an action on the case for falsely enrolling him.

“2. The court erred in rendering judgment against the defendant for treble costs.

“3. There is error in taxing treble costs, by making three times the amount of single costs; they should be half single costs, and fourth single costs.”

The opinion of the court (HUSTON, J., dissenting on the first point,) was delivered by

GIBSON, C. J.—It is conceded, that if the court-martial had

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jurisdiction, the defendant was justifiable in causing its sentence to be executed. That it was legally constituted, and had jurisdiction of the offence, is not disputed. But it is alleged that the plaintiff was not *de jure*, a member of the company; consequently, that the court had not jurisdiction of his person; and [*203] hence, it is inferred, that the *sentence is void, and the defendant a trespasser. This inference is not supported by authority, and it is certainly against reason. In *Vanderheyden v. Young*, 11 Johns. Rep. 150, pleading guilty was held to be such an admission of jurisdiction, both of the person and of the offence, as to conclude the party in a subsequent proceeding. Consent cannot give jurisdiction of the offence; but I incline to think, that such an admission would protect the court and its officer, on the maxim *quod volenti non fit injuria*. That decision is, however, clear and indisputable law, as regards jurisdiction of the person. A right of individual exemption may be waived; and where it is found against the party, he stands precisely as if it had not been asserted. It will not be pretended, that an attorney who had ineffectually pleaded his privilege, would, by subsequently establishing it, entitle himself, in England, to treat the sheriff as a trespasser; or, that a militiaman could maintain trespass against the members of a court-martial for having erroneously decided, that he had not attained the age at which military duty ceases, when the offence was committed. If personal exemption could be urged any where but before the court-martial itself, no one concerned in the execution of the sentence would ever be safe. The members would proceed at their peril, although the fact of exemption, might, as in the case before us, be extremely doubtful on the evidence. A plea to the jurisdiction, is a plea in abatement; but a defence, that the accused was not a member of the corps, and not liable to military duty in it, is not in abatement, like the plea of privilege, which alleges jurisdiction elsewhere, but in bar. It goes to the root of the charge, the military character of the accused being the foundation of the prosecution, and a fact, without proof of which, the offence cannot be made out. As, then, the fact of soldiership is one on which, where it is denied, every court-martial must pass, it would be intolerably severe to require the members to decide it at the peril of becoming trespassers in case the accused should be able to make out the facts of his defence, by more satisfactory evidence subsequently; and this although they may have been compelled to decide a question of great difficulty, and have acted with the most perfect good faith: and it would still be more severe to implicate the officer who should execute the process, which ordinarily furnishes a sufficient justification, if no irregularity, or

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want of jurisdiction, appear on the face of it. No danger is to be apprehended that courts-martial will arbitrarily assume jurisdiction of those who are notoriously not subject to military law. An act of such glaring injustice would be evidence of *mala fides*, and such a gross abuse of authority, as, on the principle of the Six Carpenters' Case, to make the members trespassers *ab initio*. But where a court-martial has, *bona fide*, convicted a person not subject to military duty, of an offence within its jurisdiction, neither the members who composed it, nor an officer who has executed its sentence, can be made to respond in damages.

As to the remaining point, the English rule of taxation in cases *like the present, is to give single, half single, and [*204] quarter single costs. How a practice, so anomalous came to be established, I know not. It seems to rest entirely on the table of costs *in principio*, of which we know nothing, here, but the name. Even the English courts evince, of late, something like dissatisfaction at it, and seem to be restrained from abolishing it, only by respect for its antiquity.* It has not been adopted here, and its inconsistency with the manifest intent of the legislature, is a decisive objection to it. It is to be observed, however, that the fees of the officers are not to be trebled, where they are not regularly and usually payable by the defendant; and, with this exception, he is entitled to treble the amount of such costs as he is entitled to charge in his bill.

Judgment affirmed.

Cited by Counsel, 3 W. & S. 168.

Cited by the Court, 6 W. 436; 4 H. 256.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Jacob *against* Pierce, Executor of Jacob.

IN ERROR.

Defects in the return of a slave, may be supplied by the registry of the clerk.

A discharge of a person by *habeas corpus*, who was claimed as a slave, is not to affect one who warranted the title as a slave, unless he had notice of the proceeding

Such notice should be actual on the person, and not constructive.

* See Staniland v. Ludlam, 4 Barnw. & Cres. 889; s. c. 10 Eng. Com. L. Rep. 465, and Milner v. McClean, 2 Carnig & Paine, 17; s. c. 12 Com. L. Rep. 6.

[Jacob v. Pierce, Executor of Jacob.]

ERROR to the Court of Common Pleas of *Cumberland* county, where the suit was between the same parties, to recover the price of negro Ben, a black servant, who had been sold by Jane Jacob, the testatrix of the plaintiff below, to D. R. Jacob, the defendant below, and the right to his service guarantied.

Proof was given of the price to be paid, and that part was yet due. Ben sued out a *habeas corpus*, in the Court of Common Pleas, against D. R. Jacob, on the 19th of February, 1819, returnable the 20th of February, when he was discharged. The defendant below endeavoured to prove service of notice on Jane Jacob of this *habeas corpus*. Ben was the son of Sall, who belonged to Paul Pierce, and was recorded in the clerk's office on the 23d of October, 1780. The return on the file was as follows, viz. :—

“Paul Pierce, of West Pennsbury township, returns the following negro and mulatto slaves, and desires to be registered, &c. Black Sall, August 25th, 1761, born,” &c., &c.

[*205] *The defendant having read this return, offered the docket entry, made by the clerk, in these words :—

“Paul Pierce, West Pennsbury, farmer.—Sall, a female negro slave for life, nineteen years.”

To this the plaintiff objected, that the entry cannot be given in evidence to vary, enlarge, or contradict the original return. The objection was overruled, the evidence admitted, and a bill of exceptions sealed.

The court charged the jury in answer to points put by the plaintiff :—

“We understand it to have been decided, by an express decision of the Supreme Court, that the original record, in a similar case, when defective, may be cured by the act of the clerk, in making the entry regularly. We will never decide contrary to the opinion of that court on the point in issue, let our private opinion be what it may. We have too much respect for the weight of theirs.

“If the jury believe, that notice of the *habeas corpus* was given to Jane Jacob, so as to have enabled her to appear and defend against the claim of Ben, for his freedom, then the discharge of Ben, by the court, on the *habeas corpus*, would be binding on her in this suit. If she had no such notice, the discharge would not be conclusive upon her. The record is *prima facie* evidence of the correctness of the discharge, but not conclusive.

“As to notice. The rules of court require the service to be by leaving a copy at the residence of the defendant ; or, in her absence, in the presence of one or more of the family, or actual notice, by showing it to the person ; or, served upon an agent

[*Jacob v. Pierce, Executor of Jacob.*]

having authority for the purpose. We know of no other kinds of service. It is of substance, not of form, that notice should be given. You decide the facts, but you are not to decide contrary to them." This opinion was excepted to, and filed.

Errors assigned :—

"1. The court erred in admitting the record of the clerk, and in the charge, as to its effect.

"2. In charging, that the discharge on the *habeas corpus* was not conclusive on the parties in this suit.

"3. In charging as to the kind of service of notice."

Alexander, for the plaintiff in error.

Metzgar and Penrose, *contra*.

The opinion of the court was delivered by

GIBSON, C. J.—It is true, that in consequence of the relation in which the plaintiff in error stood to two of the judges, the case of *Stiles v. Nelly*, 10 Serg. & Rawle, 367, was ruled by the Chief Justice alone. It is also true, that the opinion expressed by me, in *Wilson v. Belinda*, 3 Serg. & Rawle, 396, remained unchanged: but the opinion entertained by Judge Duncan, coincided with that of the Chief Justice. That case, however, went to the world as a *decision of the court [*206] in the last resort, and a rule of property, so that it would be pernicious in its consequence, and of bad example to overthrow it now, for a mere speculative error. No lasting mischief can arise from it in practice, as the species of property to which it relates must shortly be extinct. On the authority of that case, then, we are of opinion, that the registry cured the defects in the return.

We are of opinion, also, that the defendant could be concluded by the discharge on the *habeas corpus*, only on proof of notice to defend. Such notice is an implied condition of every contract of warranty, because the fact of an adverse demand, when made, must necessarily lie more particularly in the knowledge of the party to be defended; and it would be against all reason to fix the contracting party with the consequences of an adverse decision, without enabling him to guard against it. The difficulty arises from an expression in the charge, which, it is said, would justify an inference by the jury, that the notice must be such as is directed by the rules of court. In cases like the present, the notice is not a matter of practice, but a part of the title, and it cannot, therefore, be regulated by the court. No rule of law requires it to be in writing, or the service of it to be proved in a way different from any other matter, *in pais*. But it must be actual, and not constructive

[Jacob v. Pierce, Executor of Jacob.]

from having been left at the residence of the party, which is sufficient in matters of practice only by virtue of the legislative power of the court. As there was nothing like proof of service on the person, the error, if there were one, was in regard to a point which did not arise out of the evidence, and it is not the subject of exception here.

Judgment affirmed.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Shriver *against* The Commonwealth.

IN ERROR.

The record of the forfeiture of a recognisance in the proper court, is conclusive evidence of the forfeiture, in debt on the recognisance.

WRIT of error to the Court of Common Pleas of *Adams* county.

The plaintiff in error was defendant below.

The judgment in the court below was in debt for three hundred dollars, on a forfeited recognisance. In February, 1827, the defendant, George L. Shriver, was bound over by a justice of the peace, in a recognisance in the sum of three hundred dollars, to appear at the next court of Quarter Sessions, to answer the complaint of ill treatment of his apprentice, Elias Thompson, and not depart without leave. The parties appeared [207] in court, and on hearing, the *master was thought by the court to have maltreated his apprentice, not in such a degree as to justify the court in dissolving the indenture, but yet demanding some punishment. He was, therefore, directed to pay the costs; but he refused, in open court, to comply with this order, on the ground, that the court had no authority to impose on him the payment of costs. The court, therefore, ordered his recognisance to be forfeited, and by the record, it appeared it was forfeited. The declaration stated the recognisance and its forfeiture. The pleas were *nil debet* and payment.

The defendant in the court below requested the court to instruct the jury, that if the defendant always answered when called, it was a compliance with the condition of the recognisance. But the court charged, that this was not sufficient: he ought to have complied with the order of the court. The defendant excepted. The jury found a verdict for the plaintiff for three hundred dollars, and judgment was entered thereon.

[Shriver v. The Commonwealth.]

Stevens, for the plaintiff in error, denied the existence of such a record as that stated in the *narr.*, and contended, that refusing to pay costs, was not a breach of the recognisance.

Carothers, contra.

The opinion of the court was delivered by

GIBSON, C. J.—The judgment of a court of competent jurisdiction, directly on the point, is conclusive in every subsequent proceeding. In an action on a recognisance, therefore, the propriety of the forfeiture cannot be investigated; nor can there be other evidence of the fact of forfeiture, than the record itself. The defendant had an opportunity to object in the Court of Quarter Sessions; and the decision against him there, is conclusive. In a *scire facias*, against special bail, the defendant can discharge himself only by an *exoneretur*, which must appear of record; and the discharge of an insolvent debtor is conclusive evidence that he has complied with the exigencies of the insolvent acts, (*Sheets v. Hawk*, 14 Serg. & Rawle, 173;) and the converse has been decided in *Gallagher v. Kenedy*, during the present term. In like manner it is held, that the orders and decrees of the Orphans' Court are conclusive in a collateral proceeding; even the case of an administration account, which was an exception, has lately been brought within the general principle. There is a dangerous, and, I fear, a growing tendency to explain, and even disprove the public records by parol evidence, which, if not checked by this court, will produce pernicious consequences. In the case before us, the forfeiture of the recognisance was conclusively established by the record; and the charge of the judge who tried the cause, was substantially right.

Judgment affirmed.

Cited by Counsel, 2 Wh. 465; 10 W. 10.

*[CHAMBERSBURG, NOVEMBER 1, 1828.]

[*208]

Wise and Another, Administrators of Greigor, *against*
Wills.

IN ERROR.

In a suit by the administrators of a constable against a justice of the peace, to recover back money alleged to have been received by him as a justice of the peace, by fraud and mistake, the justice is entitled to previous notice under the act of 1772.

[Wise and another, Administrators of Greigor, v. Wills.]

WRIT of error to the Court of Common Pleas of *Cumberland* county. The plaintiffs in error were plaintiffs below, in *assumpsit* for money lent and advanced, money paid, laid out, and expended, and money had and received. Pleas, *non assumpsit* and payment, with leave to give the special matters in evidence.

The cause of action appeared by the following receipt, signed by the defendant, and given in evidence by the plaintiffs on the trial :—

“Received, November 27th, 1814, of John Greigor, by the hand of Michael Haber, three hundred dollars, on sundry executions which were put into the hands of Adam Greigor, deceased, who served as deputy constable for the aforesaid John Greigor, per me. . . .”

“A. WILLS.”

The nature of the case appeared from the following charge to the jury :

“This is a suit for money had and received. The evidence shows, that the money claimed by the plaintiffs was received by the defendant, in virtue of his office as a justice of the peace; being the amount of debt, interest, and costs, in a number of suits brought before him, by different plaintiffs against various defendants; in which trials were had, judgments rendered, and executions issued, and put into the hands of Adam Greigor, as deputy constable of John Greigor, and the moneys paid over by John Greigor to the defendant. It is now alleged that the constable was not liable: That the debt, interest, and costs, &c., were not due, or had been paid: That there was mistake and fraud in the settlement and receipt of the money, and the defendant should refund. It is objected that no notice was served on the defendant, agreeably to the provisions of the acts of assembly, &c. We have no doubt, the law requires a previous notice, before the suit can be sustained. The money was received by the defendant as a justice of the peace; received by him in his official character. The computation and reckoning were by him as a justice of the peace. All his dockets are made by him as a justice. If there is fraud, it is official fraud; [*209] *and if mistake, it might have been rectified without suit, if notice had been served. We think the plaintiffs cannot recover.” To this charge the plaintiffs excepted.

Two errors were now assigned :—

“1. The decision of the court was erroneous, that previous notice to the defendant was required by the act of assembly of the 21st of March, 1772, of the suit, whether the money, which it was brought to recover back, was received by him through mistake, or fraudulently.

[Wise and another, Administrators of Greigor, v. Wills.]

"2. That the court took from the jury the decision of the facts which had been adduced in evidence."

The cause was argued by *Williamson* and *Carothers*, for the plaintiffs in error, who, in their argument, relied upon the words of the act of assembly of 1772, *Purd. Dig.* 351; *Prior v. Craig*, 5 *Serg. & Rawle*, 44; *Norris's Peake*, 620; 2 *W. Black. Rep.* 1330; 2 *Stark. Ev.* 811; *Eastwick v. Hugg*, 1 *Dall.* 222; *Jones v. Hughes*, 5 *Serg. & Rawle*, 301; and by *Penrose* and *Ramsey*, for the defendant in error, who relied upon the same act of assembly. In their arguments they cited, *Mitchell v. Cowgill*, 4 *Binn.* 24.

The opinion of the court was delivered by

HUSTON, J.—No evidence was sent up except the copy of the receipt, which it is not necessary to copy. The only statement of the evidence was contained in the charge of the judge of the Court of Common Pleas. This is a suit for money had and received. The evidence shows, that the money claimed by the plaintiffs, was received by the defendant in his official character, and by virtue of his office of a justice of the peace, being the amount of debt, interest, and costs in a number of suits brought before him by different plaintiffs against various defendants, in which trials were had, and judgments given, and executions issued, and put into the hands of Adam Greigor, as deputy of John Greigor, the constable. John Greigor paid over this money to the defendant. It is now alleged, that the constable was not liable: That the debt, interest, and costs, were not due or had been paid: That there was a mistake or fraud in the settlement and receipt of the money, &c., and that the defendant should refund. It is objected, that no notice was served on the defendant, agreeably to the provisions of the act of assembly. We have no doubt, the law requires a previous notice before this suit can be sustained. The money was received by the defendant as a justice of the peace, received by him in his official character. The computation was by him as a justice of the peace; all entered in his dockets as a justice of the peace. If there is a fraud, it is official fraud; and if mistake, it might have been rectified without suit, if notice had been served. We think the plaintiffs cannot recover.

By the act of assembly of 1810, the justice, as justice, was to receive the money.

*It has been argued, that the act only relates to actions sounding in tort; not to *assumpsit*, *replevin*, and actions [*210] not admitting the plea of not guilty. The cases cited on this subject are all under the sixth section of the act, and relate to

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suits against the constable, or some other officer executing the process of justice; and there are authorities to this effect. Norris's Peake, 620. As I do not at present see the reasons on which these decisions are founded, I shall say no more about them. But the decisions, so far as my research has gone, are confined to constables, &c., and such officers, as by other laws, have the same protection. If there is any case in which the same decision has been made, as to justices, I have not found it.

Our act of assembly is only a transcript of a British statute. In England, justices have no civil jurisdiction, strictly so called; in other words, no debts are sued for before them. When our act passed, justices had jurisdiction of debts not exceeding five pounds; now, of debts not exceeding one hundred dollars; and more than nine-tenths of their business is collecting debts. Although no case can be found which goes to show that the British act was applied to protect a justice receiving a debt by mistake, it does not follow it is not a protection here, or would not be there (in fact, in some cases, since the revolution, where they do enforce the payment of money, it is a protection), if they had jurisdiction; (for anything done in execution of his office will embrace civil as well as criminal matters); and it has been so considered, I think, whenever it has come before our courts. See *Kennedy v. Shoemaker*, 1 Browne, 61; *Slocum v. Perkins*, 3 Serg. & Rawle, 295; *Prior v. Craig*, 5 Serg. & Rawle, 44; *Jones v. Hughes*, 5 Serg. & Rawle, 301; *Lake v. Shaw*, 5 Serg. & Rawle, 517.

The statute supposes some wrong to have been done, some excess of authority, or want of authority, or of jurisdiction; for where everything has been done according to law, the act is useless.

There are cases in which it is discussed, which will protect a justice, and he has been protected as far as the law and the safety of the community will bear. This is, however, a different question from, in what cases is notice to be given? The words of the act, and the object of the act, agree, and no case would more require notice, that amends might be tendered; and if money has been paid over, that it might be got back and restored, than such a one as the present.

The act was made to prescribe a certain requisite; it requires a notice where the act was done in execution of his office; it does not discriminate between mistake, malice, or fraud, and I do not see how we can. It provides a certain rule. If we leave this, the court, or the jury, must make the rule; and this would result in anything but a certain or uniform rule.

I doubted, on account of the last section, limiting the time of

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action; but if not brought within that time, and the justice has received the money, which he does not pay over to those entitled, there is a remedy and a summary one, to compel him to pay it over.

*TOD, J.—The plaintiffs' testator, John Greigor, being elected constable, not acting in the office himself, but [*211] executing it by his deputy, Adam Greigor, and that deputy being dead, he pays over to Wills, the justice, the round sum of three hundred dollars, and takes a receipt in very general terms. Not long after having made this payment, the principal himself, John Greigor, also dies, and his administrators, alleging mistake or fraud, and that no such sum was due to Wills, the justice, bring this action to recover back money, which they undertake to show belongs to the estate of their decedent. The court below, without entering into the merits of the cause, were of opinion, that the plaintiffs were barred of their action, by reason of their having omitted to give thirty days previous written notice, under the act of assembly of 1772, entitled "An act for rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others for acting in obedience to their warrants."

This act of assembly being a transcript almost *verbatim* from the English statute of 24 George 2, c. 44, s. 6, it is very true, that our legislature, in adopting the very words, probably intended to adopt also the construction which had been put upon the same words by the English courts of law. It is very true, also, that by the English decisions, the statute has been largely applied in favour of the officers of justice, and has been made to extend to every case where a man acts *bona fide* in the supposed execution of his duty. Norris's Peake, 619. Indeed, so liberal has been the construction of the statute in that country to protect the officers of the law, that the court, in one case, expressed an apprehension, that if it was to be carried any further, actions of this sort would be entirely defeated. But even in England, I am not aware, that there can be found a precedent, or *dictum*, in any book of reports, or elementary treatise, requiring thirty days' written notice, previous to a suit in nature of debt. The authorities are all the other way, and seem to me decisive. "These statutes," says Peake, "being made to protect the officer against actions which go to charge him with money, by way of damages, for an irregular execution of his office, have been held, not to extend to actions of replevin." Norris's Peake, 617; Bull, N. P. 24. "Some excise officers (who are protected by the same, or a similar statute,) having, as such, illegally extorted a sum of money, it was held, that the statute did not apply to the

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case, and that the notice was unnecessary previous to the commencement of an action of assumpsit, to recover back the money." Norris's Peake, 620. "This clause, (requiring notice, &c.) embraces actions of tort only, and does not extend to actions brought against an officer for money had and received, which had been levied by him under a conviction which was afterwards quashed." 2 Stark. Ev. 810; 2 W. Black. 1330.

Now, I take it, that it is by no means the rule in Pennsylvania, to extend the construction of the statute for the protection [*212] of officers, *further than it has been carried by the courts in England. The very contrary has been often declared, and particularly, by all the judges, in *Mitchell v. Cowgill*, 4 Binn. 20, and on the very point now before us, *Gibson, J.*, in giving the opinion of the court in *Prior v. Craig*, 5 Serg. & Rawle, 44, says, "It is true, an action of assumpsit to recover back fees illegally taken, may be sustained against a justice, without giving him notice, for the plaintiff thereby waives the official tort, as he may well do, and goes only for the money actually extorted; but when he goes for a penalty, or for damages for a tort, the case is altogether different." Then, as far as precedents go, the decision of the court below would seem to be wrong. It would be with some reluctance that I would consent to disturb the settled construction, even if I thought it erroneous. But here, if a construction was now to be put upon the statute for the first time, I should be inclined to have the same opinion, and to believe, that its provisions were not intended to apply to a case like the present. If a justice, as such, has a legal demand, and is once paid in full, and afterwards, by mistake, or otherwise, receives the same money over again, it is not clear to me, that he can be said to receive this last payment by virtue of his office; nor do I see by what explicit rule of law, after execution issues, the justice, as such, is entitled to receive any of the money, except his own fees. Still less clear does it seem to be, in the settlement with John Greigor, and the receipt of the three hundred dollars, if, as the administrators allege, the justice received money not payable to him, and put it into his own pocket, how this transaction, between two men, and the justice himself one of them, can rightly be called a judicial act, and in this way his claim as a creditor, and his taking of the money, be transformed into a sort of decision, as a justice of the peace. But waiving all these matters, and supposing that the justice received the money by virtue of his office merely, still, if he has been overpaid, if there has been any mistake or deception, which I by no means say is proved by the evidence, but which I say the jury ought to have been left to decide on, then my opinion would be, that

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the same rules of law would apply to the case that would apply to a mistake or fraud in a like transaction between other persons; and precisely the same notice, or previous request, would be required in proof, which would be required in case of a defendant not a justice, receiving money not his own. I take it, the act of assembly was not meant to apply to the case of a debt, nor to money alleged to be overpaid on sundry executions; but to cases of abuse of authority, or official injury done; cases in which the jury may, if they think proper, give vindictive damages. The term vexatious, in the act of assembly, the tender of amends, the power of the jury to decide, whether the amends are sufficient, the plea of not guilty, all seem wholly unintelligible, if applied to the recovery of a debt. A short limitation against vindictive actions is common enough, but a provision by statute, cutting off a mere debt, *fair and just, by a limitation of six months, if found in this act of assembly, is, I think, found here only. There [*213] appears some absurdity in the very idea of a plea of not guilty in a suit brought by administrators, and, what seems still more irreconcilable with all legal notions, if the justice, in a case like this, should happen to die, there might not only be a plea of not guilty on behalf of administrators in a suit brought by administrators, but the court might be called upon to certify, that an injury had been wilfully and maliciously committed by a dead man, and to punish it by double costs upon his representatives. If a justice of the peace holding the money of another, cannot be sued for the debt, without thirty days' written notice, then, I apprehend, it ought to follow, that a constable getting money into his hands on execution, should not be sued for it without the six days' previous written notice and demand: for by the act of assembly, the notice to the constable is as positively required, as the notice to the justice. Yet, in practice, I believe, such notice was never required in case of demand of money collected by a constable.

GIBSON, C. J., concurred with TOD, J.

Judgment affirmed.

Cited by Counsel, 3 R. 212; 2 Wh. 347; 7 C. 156.

Cited by the Court, 6 W. 386

Distinguished in 19 S. 262, where it is held that in a suit upon the official bond of a justice, notice need not be given.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Folker and Another, Administrators of Huggins, *against*
Satterlee.

IN ERROR.

In no case can a continuance be demanded by reason of an amendment, unless where the opposite party is thereby taken by surprise, and of that matter, generally, the court must judge.

WRIT of error to the Court of Common Pleas of *Perry* county.

The material part of the case, in substance, was:—Satterlee, the plaintiff below, sued one Rogers and Huggins, the intestate, jointly, in debt on a promissory note, by summons, which was returned, served on Huggins, and *non est inventus*, as to Rogers. There was a general appearance by attorneys, marking their names on the margin of the docket, and a plea apparently by Huggins only, the words being, the defendant pleads. Huggins afterwards dying, a writ of *scire facias* was sued out against Folker and Rinehart, his administrators, to bring them in as a party to the former action, according to the act of assembly. *Purd. Dig.* 276; 3 *Sm. L.* 30. The administrators appeared to the *scire facias*, by their attorney, and being afterwards called upon by motion, in court, to become party defendants to the original suit, they declined it. And, persisting in *the [214] refusal, they offered sundry pleas to the *scire facias*: 1. *Nul tiel record.* 2. That if there be any record of any suit, &c., it is of a suit against Rogers and Huggins both, to which they both pleaded, and issue was joined, and that while the cause was pending, Huggins died, viz., on the 6th of December, 1824, and that Rogers is still in full life. 3. *Non assumpsit* and payment. 4. *Plene administraverunt* and no assets; which pleas were filed. At the same time, the plaintiffs' counsel asked leave to withdraw the statement in the first suit and file a new one, materially amended. This was opposed on the part of the defendants, but granted by the court. The defendants then asked a continuance, alleging surprise. The court held, that all the matters pleaded, or applied for on behalf of the defendants, could only be investigated after an appearance to the original suit, or upon trial, on proper issues to be formed. Whereupon, on motion of the plaintiff's attorney, the court gave judgment in the original suit against the estate of Huggins, in the hands of the administrators. A bill of exceptions was tendered and sealed.

[Folker and another, Administrators of Huggins, v. Satterlee.]

Errors assigned :—

“1. In permitting the new statement to be filed, without a continuance.

“2. In giving judgment for the plaintiff, when it should have been for the defendants.”

The cause was argued by *S. Alexander* and *Carothers*, for the plaintiffs in error; and by *Watts* and *Penrose*, for the defendant in error.

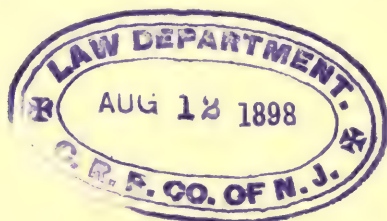
The opinion of the court was delivered by

TOD, J.—The amendment was rightly permitted. We hold the law to be, that in no case can a continuance be demanded by reason of an amendment, unless when the opposite party is thereby taken by surprise; and of that matter, generally, the court below must judge. Here, it does not seem that any immediate trial was intended. All that was asked for at the time, was, that the administrators should defend in the original action. The plea of *nul tiel record*, was certainly one which the defendants below had a right to put in to the *scire facias*. But it was a plea for the court to decide on by inspection; and, we think, they virtually did decide it against the defendants correctly. To the *scire facias* the defendants might also have pleaded, that they were not administrators: they might have objected want of due notice on the summons, or relied upon any fact, to show, that they ought not to be put into the cause, and compelled to stand in the former place of the intestate: but they offered nothing of the kind. The plea, that if there was any record of any suit, it was of a suit against Rogers and Huggins; that they both appeared, and pleaded to it; that Huggins died, and that Rogers was still living, was completely inadmissible. It was *multifarious; it was mingling matters of fact and law; [*215] it was putting to the jury a question of the merest law, upon the construction of the record. Our opinion is, that the court below gave the judgment which the act of assembly expressly required to be given.

Judgment affirmed.

Cited by Counsel, 6 C. 301.

Cited by the Court, where it is approved, 4 W. & S. 144.



[CHAMBERSBURG, NOVEMBER 1, 1828.]

Clark *against* Campbell and Williamson.

IN ERROR.

Testator devised to his wife, during her lifetime, or widowhood, all his estate, real and personal, to be applied by her towards raising and schooling his children, and at her decease, the remainder, if any, to be divided according to the laws of this commonwealth, share and share alike: and in case she should see cause to marry, she was to have only her bedding, and an equal share with the children that might then be living, out of his estate, and the remaining executor, or guardians of the children to take care of their parts. He then appointed his wife and another executors, empowering them to sell the tract of land in dispute, and the money that might be got for it to be laid out on other property, or to the best advantage, except what might be necessary for keeping, schooling, and raising the children, until they were empowered to call for it, agreeably to the former part of the will. The wife survived the other executor, and married. Held, 1. That she and her husband had no power to sell. 2. That after the children had arrived at full age, the power, even if the other executor had been living, ceased.

A purchaser at sheriff's sale is not affected by any secret transfer by the defendant, by parol, previous to the judgment, particularly if the defendant was then in possession.

WRIT of error to the Court of Common Pleas of *Cumberland* county, in an action of ejectment, in which the plaintiff in error was plaintiff below, and claimed two undivided sixth parts of a tract of land.

The facts material to the case appearing in evidence on the trial, were as follows:—

Robert Coffee being seised of the whole tract in question, died about the year 1800, leaving a widow and five children, having duly made his last will, as follows:—

“I give unto my beloved wife, Nancy, during her lifetime, or widowhood, all my estate, real or personal, to be by her applied towards raising and schooling my children, and at her decease, the remainder, if any, to be divided according to the laws of this commonwealth, share and share alike. And, in case she should see cause to marry, she is to have only her bedding, and an equal share with the children that may then be living, out of my estate; and the remaining executor or guardians of the children, to take care of their part. And I do hereby constitute [*216] and appoint my loving *wife, Nancy, and my trusty friend, John Reynolds, as executors to this, my last will and testament, hereby empowering them, if they think fit, and get what they judge a sufficient price for it, to sell and convey a small tract of land, (the tract in question,) belonging to me in Southampton township, Cumberland county, adjoining my

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brother, Thomas Coffee, John M'Lain, and others, containing near one hundred acres, be the same more or less, hereby giving them, or the survivor of them, full power to sell and convey, and to make, execute, sign, seal, and deliver a conveyance, or conveyances, for the same, in as full and ample a manner as I could do were I living, and present. And the money that may be got for it to be laid out on other property, or to the best advantage, except what may be necessary for keeping, schooling, and raising the children, until they are empowered to call for it, agreeably to the former part of this."

Nancy, the widow, intermarried with M'Knight, in 1805. John Reynolds, the co-executor, died in 1814. It appeared, that M'Knight, on his marriage, took possession of the land; and during the infancy of the children, and down to the year 1817, held the whole, or greater part of it. Thomas and John, two of the sons of the testator, after they came of age, appear to have been in possession of a part for a number of years; and, at one time, the land was rented, and the rent, as the witness said, payable to the heirs. It was sworn, that Thomas sold, by parol, his interest under the will, to M'Knight, in 1806, for two horses, which he received; and, that John also, by parol, sold to M'Knight his interest, for one hundred and fifty dollars, which he received. A receipt was also produced, signed by John, and given to M'Knight, dated the 15th of April, 1818, for four hundred dollars, "for my share and a half (he had purchased a half share,) in the estate of my late father." On the other hand, it was sworn, that in 1821, by the unanimous consent of the heirs, (except an infant child of Robert, who had died,) a partition was made of the property by a surveyor, employed for the purpose, into six shares, divided by metes and bounds, and that Thomas and John drew their shares by lot with the rest. Mrs. M'Knight, the mother, also, drew her share. Mrs. M'Knight, objected; for what reason is not stated, and the partition appears to have been abandoned. The youngest child of the testator came of age in 1819. In March, 1822, M'Knight, together with his wife, the executrix, under the alleged power in the will, by deed, reciting a consideration in money, and recorded in July following, sold and conveyed, in fee simple, the whole tract to Williamson, the defendant.

Clark, the plaintiff in the ejectment, derived his claim as follows:—In April, 1819, the executors of John Krisher, obtained a judgment by confession, before a justice of the peace, against Thomas and John Coffee, two of the sons of the testator, for four hundred and fifty-eight dollars. A transcript of this judgment being *filed in the prothonotary's office in May, [*217] 1820, after sundry executions, and a levy upon the in-

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terest of Thomas and John in the land in question, a sheriff's deed was, in due form, made to Clark, the plaintiff, for the two undivided sixth parts of Thomas and John.

The plaintiff, on the trial, presented sundry points of law to the court. None of them, except the fourth, is material. The answers to the rest were not complained of. The fourth point was: "That if the children were all of age, several years before the alleged sale to Williamson, and all married, and all necessity of schooling, raising, and supporting them, had long ceased, and the widow was married in 1805, then the widow and her husband had no power to sell the land at all in 1822."

The court charged the jury: "The plaintiff purchased at sheriff's sale the alleged estate of John and Thomas Coffee in the tract of land of their father, as described in his will; and this ejectment is brought to recover the possession. Suppose the suit was by Thomas and John Coffee against the defendant, could they recover? Old Robert Coffee, the father of John and Thomas, owned the land. He made his will, and appointed his wife executrix, with J. Reynolds, executor. Reynolds soon after died. In that will, the widow, as surviving executrix, had power to sell the land referred to, and the proceeds were directed to be appropriated in a particular way. What did Thomas and John take under the will? The legal estate, by the operation of the will, and the act of assembly of 1792, was vested in the executors. They had a right to take possession of it, and a right to sell. Thomas and John either were to take a legacy, in money, out of the proceeds of the sale, or at most, had an equitable interest in the land. If the executors had denied the trust, or refused to execute it, they might have been compelled by ejectment. But if they have not denied the trust nor refused to execute it, I cannot see how an ejectment could be sustained against them. The law gave them the right to possession, and the legatees, as such, could not deprive them of it. There was a discretion vested in the executors, or survivor, as to the sale, and price, by the will. The power to sell is not limited to the period of the infancy of the children, as contended for by the plaintiff's counsel, and a sale was actually made by the executors to D. Williamson, and the deed recorded before the sale by the sheriff to Mr. Clark. It might operate most unjustly if the plaintiff's construction were given to the will. Suppose the facts to be as John Coffee, (a witness,) stated, that Thomas did actually sell out his share to M'Knight, who had married the executrix, and that John Coffee did sell out his also, and both did actually receive, in money, the whole amount of their interest, from the husband of the surviving executrix, long before the judgment on which the sale to the plaintiff was

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made. If such were the facts, in connection with the sale, as stated, I cannot see how the plaintiff can recover in this suit. As to the fourth point *proposed, we cannot answer in [*218] the affirmative. We refer to the remarks made before taking up the points, as a fuller answer to this proposition."

In the charge of the court to the jury, three errors were now assigned, viz.

1. That the executors of R. Coffee were entitled to the possession of the land, and could not be deprived of it by the heirs, and the plaintiff could not recover.

2. That the power to sell was not limited to the infancy of the children; and in refusing to answer the plaintiff's fourth point in the affirmative.

3. That if T. and J. Coffee sold their interest to M'Knight, who married the executrix, and received the price before the judgment and the sheriff's sale, and if the executors sold to Williamson, whose deed was recorded, the plaintiff could not recover, without any reserve as to the possession, clearing, &c., or want of notice to Krisher's executors, or Clark, of the parol sale, &c.

S. Alexander, for the plaintiff in error, argued, that no power to sell was given to the executrix and her husband; and that if the power did once exist, it ceased on the extinction of the object of the sale by the coming of age of all the children. In either case, the shares of the children were real estate, bound by judgment, and recoverable by ejectment. The intent of the will is manifest. Instead of a power left to the widow by a future marriage to transfer to a second husband the disposal of the children's property, the plainest implication is, that after a second marriage she was no longer to be even executrix; for, while she should continue executrix, Reynolds could not with any sense at all, be called, as he is in the will, the remaining executor. We are to take the whole will together; also, to give to every part a reasonable meaning, if possible, which it is apprehended would not be the case here, if by construction only there can be made out a design in the testator to take from the widow the care of the most trifling personal property, because of her second husband, and yet to give to that same second husband the entire disposal, not only of the personal effects, but of all the land in fee simple. But even Reynolds himself, the executor, had he lived, would have no power to sell after the children had attained their age. The object of the power was ended, and therefore the power itself was at an end. *Dailey v. James*, 8 Wheat. 531; *Ellsworth's Lessee v. Jansen*, 6 Johns. Rep. 73; *Lessee of Smith v. Folwell*, 1 Binn. 558. The case

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of Ellsworth's Lessee v. Jansen, was similar to this in most respects, except that the implication was not so strong as in this. It was a case, not of a public, but a private sale, like the present. It was a case of a sale to a relation, a son-in-law of the executor; here the sale was to a brother-in-law. But there is another point. Here was an election and agreement to take the land itself, carried into effect by a partition completed by metes and bounds: an election and agreement which Thomas [*219] and John Coffee, after their rights have become vested in their creditors, cannot be permitted to retract. The alleged parol sales to M'Knight, it is believed, were by the statute of frauds merely null and void; particularly under the circumstances of this case, the witness testifying to the parol sales being brought to disprove his own title, after a transfer by the law to another, contradicting his own previous acts, having for a long time after the supposed sale, held the land, or a part of it, in his own possession, as his own property, and not as a tenant; and having so late as 1821 made an actual partition and drawn lots for his share; while the previous possession, whatever it was, of M'Knight can be, and by the settled rules of law ought to be, referred to his assumed power as guardian, and to his ownership of an undivided share in right of his wife. *Billington v. Welsh*, 5 Binn. 129; *Withers's Appeal*, 14 Serg. & Rawle, 185.

Williamson and Carothers, contra. If the facts are well considered, we apprehend there can be no doubt of the law. M'Knight held possession of the land up to 1817. The two sons came in by renting, not by any election. There can be no stronger disaffirmance of title, than by their possession as tenants paying rent. In 1821, M'Knight again came in and held the land until the sale to Williamson. That meaning of the will which is said to be so clear is not visible to us. The beneficial interest intended for the widow is given in one part. In another part, altogether unconnected, is the power to sell, granted to her as executrix—"Hereby giving them, or the survivor of them, full power," &c. Words cannot be more express. In the will there is no limitation of the power to the time in which schooling, &c., would be necessary; and the law fixes no limitation. It is said, here is a limitation by intendment. If so, it must be a forced intendment. The circumstances, even if the words of the will were doubtful, would go far to explain the intent of the testator. The children all young, the impossibility of all coming of age at the same time, and the consequent impossibility of each taking his share at twenty-one, unless he was to take it in money, the obvious difficulty of making a title from various future accidents, unless

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prevented by a power in the will, altogether seem to make it next to impossible that the testator could have meant to provide for his children by leaving each of them seventeen acres of poor land. Here was not a naked power. It was an interest in the executors. The provisions of the acts of assembly, *Purd. Dig.* 277, are conclusive upon this point. There is not even a resulting trust left to the heirs. Their remedy could never be by ejectment. *Henderson's Executor v. Wilson's Executors*, 13 *Serg. & Rawle*, 330; *Cook v. Duckenfield*, 2 *Atk.* 565, 568; *Gause v. Wiley*, 4 *Serg. & Rawle*, 521.

The power was well executed. If a married woman be executrix, the husband has the whole authority with or without her assent. *Toller's Law of Executors*, 412. As to notice—the will was *notice, vesting, as it did, the land in the executors or the survivor of them. Besides, Williamson's [*220] deed was recorded in July, and the sheriff's deed to Clark was not made until the September following. At any rate, notice to a judgment creditor is not essential. *Heister v. Fortner*, 2 *Binn.* 42. The partition was never agreed to by M'Knight. In itself it was a mere nullity, void by the statute of frauds, being by parol only and not followed up by possession. *Ebert v. Wood*, 1 *Binn.* 218. As to fraud, no fraud is directly alleged; nor can there be any probable inference of it from this record. The fact of Williamson having been the brother-in-law of M'Knight will support no such charge. Nor was the attention of the court below called to this matter at all.

The opinion of the court was delivered by

TOD, J.—I cannot say that the third assignment of error, relative to the effect of the parol sales, has been sustained by the plaintiff in error. With one exception, neither the points of law submitted to the court below, nor the answer to them, have been placed on the record. If the shares of Thomas and John, are to be considered as real estate at the time of the judgment against them, and not as a mere right to the proceeds of the money, then, clearly, by the statute of frauds the purchaser at sheriff's sale is not to be affected by any secret transfer by parol, particularly if the fact was that Thomas and John were in possession of their shares at the time of the judgment entered against them. This matter we look upon as settled by the case of *Withers's Appeal*, 14 *Serg. & Rawle*, 185. The main point in the cause then is, Had M'Knight and wife, under the will, a subsisting power to sell? Concurring, as I do, most fully in most of the reasoning of the court below, yet on this subject it does appear to me that in the hurry of a jury trial they have mistaken the law. I think there was no power of sale

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in the surviving executrix and her husband at any time. If there had been such authority in them at one time, I would think the power was ended when all the children had arrived at full age. There is no doubt of the law as laid down in Toller's Law of Executors, 240 :—"If a married woman be an executrix, or administratrix, the husband has a joint interest with her in the effects of the deceased, such as devolves the whole administration upon him, and enables him to act in it to all purposes, with or without her assent." But, in defining the extent of a power, the words of the grant of it are to be chiefly, or rather solely regarded. If there is a general rule, without any exception applicable to last wills, it is that the declared intent of the testator shall be effectual, so far as it opposes no principle of law. To make out the intent, all the parts of the will must be taken together. "I give unto my beloved wife, during her lifetime, or widowhood, all my estate, to be by her applied towards raising, &c. And in case she should see cause to marry, she is [*221] only to have her bed and *bedding, and an equal share with the children, &c. And the remaining executor, or guardians of the children, to take care of their parts." His meaning seems to be not to trust his children to the care, nor their property to the disposal of any future husband of his widow. That he intended a perpetual guardianship to be lodged in a stepfather must, I think, be out of the question. Nor are these provisions of the testator to be looked upon as overruled and defeated by the subsequent parts of the will giving power to the executors, or the survivor of them, to sell and convey. There is, I take it, no contradiction. The testator seems to have provided first for the case of his wife's marrying again, and next for the case of her continuing a widow, giving her the fullest power in the latter event, and no power at all in the former. But no matter who were the executors; even if Reynolds himself had been living, he could not, I think, legally sell the land in 1822. The object of the power had then ceased. All the children had then attained full age. Raising and schooling were then at an end: therefore, so was the power. The decisions have been frequent on this point. Without any precedent, the direction in the will, to lay out the overplus in other property, or to the best advantage, until they (the children) were empowered to call for it, would seem to show that the only sale he meant was a sale while the children, or some of them, were unable to sell for themselves; and that there was a termination of the power implied in the very nature of it; just as a power to sell for payment of debts would imply that no lands are to be sold from the heirs after the debts are all paid. To support the sale to M'Knight, the acts of assembly of the

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12th of March, 1800, and 31st of March, 1792, have been cited. Those acts do expressly direct that a power to sell lands shall pass to a surviving executor, or to an administrator with the will annexed, and that a naked power to sell shall be as available as a power coupled with an interest. In my opinion these acts of assembly are misapplied to the present case. They were formed to obviate inconveniences, to remove doubts, and settle points of law altogether different from any that are contested here. This case depends upon the will. Certain I am it would be a perversion of the two acts of assembly, so to construe them as to oblige a man to intrust the guardianship of his children to another, in spite of all the directions he can put into his will to the contrary. The opinion of the court is, that the judgment be reversed, and that a *venire facias de novo* be awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 Wh. 260; 8 W. 499; 9 H. 439.

*[CHAMBERSBURG, NOVEMBER 1, 1828.]

[*222]

M'Coy against Scott.

IN ERROR.

An administrator who collects the rents and profits of the real estate of the intestate, holds them as trustee for the heirs, and not for the creditors.

Until the right of the heirs is divested by a sale by the administrator under an order of the Orphans' Court, or by execution, the right of the heirs to the land is as absolute as that of their ancestor.

ERROR to the Court of Common Pleas of *Franklin* county.

The opinion of the court (HUSTON, J., dissenting) was delivered by

ROGERS, J.—Although lands in Pennsylvania are considered as chattels for the payment of debts, yet in the case of an intestacy, the real estate goes to the heirs, and the personal estate to the legal representatives. The security exacted from the administrator has reference to the value of the personalty, as was decided at Sunbury, when we held, that the surety in an administration bond was not liable for the real estate. When lands are wanted for the payment of debts, there is a mode pointed out by the act of assembly, which the administrator is bound to pursue, for the real fund is not absolutely, but *sub modo*, assets in his hands. Until this proceeding takes place, the administrator has nothing to do with the real estate; and

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this I believe to be the universal understanding of the profession, and has, on several occasions, received the sanction of this court. The administrator, M'Coy, collected the rents and profits of property which had been leased by the intestate in his lifetime; and the question is, whether the administrator be a trustee for the creditors or heirs. We are of the opinion, the money was received for the benefit of the heirs. It is objected that this impairs the rights of the creditors, but this will depend upon the question, to whom does the law adjudge the right to the money arising from the rents and profits? for as it will be observed that this money was received by the administrator, without any authority from the Orphans' Court, it will be considered to have been received for the benefit of those to whom of right it belongs. The creditors have two remedies: they may either proceed to sell the estate themselves, by judgment and execution, or they may await a sale to be made by the administrator, under an order of the Orphans' Court. It is a benevolent principle of law, that, until this be done, the widow and children shall not be altogether destitute of support. The law does not place them absolutely at the mercy of the administrator. If the administrator can interfere with the rents and profits, for the use of the creditors, it would be his duty to do so; and it [*223] *would be at the peril of the administrator if the widow and children were suffered to remain on the premises; for in case of an eventual deficiency of assets, he would be guilty of a *devastavit*. Justice, then, to himself, would make it necessary, in all cases, where there was a chance of insolvency, to exact security from the widow and children; which has not yet been done, and, indeed, in many cases produces misery and distress. Until the administrator has settled his administration account, it cannot be known what debts against the intestate will remain unpaid. Nor until the administrator has thought proper to pursue the mode pointed out by the act, to possess himself of the real fund, or the creditors to proceed for recovery of their debts, can it certainly be known whether the real estate be wanted for the payment of the debts, or whether the personal estate will not be sufficiently abundant for that purpose. Hence it is, that when the heirs receive the rents and profits, or live on the land, and cultivate the soil, and expend the proceeds in the maintenance of the family, under an idea which proves unfounded, that the property is their own, to compel them to refund, would sometimes be attended with utter ruin, and almost always with great inconvenience. It is a strong argument with me, that in cases of such common occurrence, not one has been produced where the heir has been charged with the rents and profits received, or money made by the cultivation of

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the real estate. The heir takes the place of his ancestor, in regard to the land, subject to the liens which bind the fund, but not its profits. If the creditors wish to receive the proceeds of the real estate, they must proceed themselves, or get the administrators to do so. And there is no hardship on the creditors to compel them to use legal diligence in resorting to a fund which is only pledged *sub modo* in payment of the debts of the deceased. If by their neglect they have betrayed the family into a false confidence, on them be the loss. They have no right to complain when they have a remedy in their own hands. As the land goes into the possession of the heir, he has a right to take the necessary estovers. If a trespass be committed, he must commence suit; the damages would be his absolutely, which seems to show that he is the owner of the fee simple, as were his ancestors, subject to be defeated by an enforcement of the claims of the creditors, or a demand made in due form by the administrator of the real fund for payment of debts. In England, when suit is brought against the heir, on the obligation of his ancestor, execution goes against the lands which are sold, the proceeds of which belong to the creditors; the intermediate profits remain with the heir, who is not bound to account for them, and in conformity with this has been the practice in Pennsylvania. The heir is considered the owner of the land, subject to the liens which are ascertained as attaching on the land, either by the administrator, or by suit brought by the creditors. Until these proceedings are resorted to, the right of the heir is as absolute as the right of his ancestor.

Judgment affirmed.

Cited by Counsel, 7 W. 141; 10 H. 511; 12 H. 274; 2 Wr. 195; 5 Wr. 175; 20 S. 408.

Cited by the Court, 2 R. 253; 4 W. 163; 2 H. 47; 5 S. 237.

*[CHAMBERSBURG, NOVEMBER 1, 1828.]

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The Pennsylvania Agricultural and Manufacturing Bank *against* John and Jacob Crevor.

APPEAL.

The lien of judgments, not revived within five years, is superseded by younger judgments duly revived, notwithstanding the death of the debtor after the judgments, where the moneys claimed arise from sales of land in the county, which were bound by the judgments.

Query, how it would be if the funds are collected from lands in other counties, not bound by any of the judgments.

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APPEAL by the plaintiffs from the decision of the court below.

Hamilton and Williamson, for the plaintiffs.

Penrose and Lyon, contra.

The opinion of the court was delivered by

HUSTON, J.—In this case the plaintiff, on the 30th of December, 1817, obtained a judgment. In February, 1819, John Crevor died. In 1825, Jacob, the other defendant, died. On the 17th of January, 1826, his death was suggested, and a *scire facias* issued, but it did not appear against whose representatives.

After the entry of the above judgment against John, other creditors had obtained judgments against him, which were duly revived by *scire facias* against his representatives, within five years, and execution issued, on which, in January, 1827, his lands were sold. A motion was made in the Court of Common Pleas, to order this money to be appropriated to this judgment, as being the eldest. The court decided, it had lost its preference, as to this money, because, not revived for more than five years. This cause was argued on the ground, that the act of assembly of 1794, directing the order of paying the debts of a deceased person; and the act of assembly of 1797, directing, that debts of a deceased person, unless secured by mortgage, judgment, recognisance, &c., should not remain a lien longer than seven years, unless an action for the recovery of the same be commenced and prosecuted, &c., or unless a copy, or particular written statement, &c., were not affected by the act of assembly of 1798. Act of assembly of the 4th of April, 1797, section fourth.

The act of assembly of 1794, directing the order of paying debts, has reference principally to the payment of debts from the personal funds of the deceased. On these personal funds, the judgment was no lien in the lifetime of the deceased. So, a judgment in one county was no lien on lands in a different county. If the money in the hands of the executors or administrators, is raised from personal estate, or the sale of lands [*225] not bound by a judgment against the testator, *the order prescribed in that act of assembly is followed; and judgments, in case of deficiency, are paid, *pro rata*, without regard to their date.

But judgments are a lien on lands within the county in which they are entered up, in the lifetime of the deceased, and entitled to payment during his life, according to priority of date. This priority is lost in five years, if no *scire facias* has issued, and the eldest and the next in order has priority, &c., &c. When

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a man, having lands bound by judgments, dies, the proceeds of the land, if sold while the judgments are in full force, go to the judgments in succession, according to their date; and the judgments, in case of deficiency, and in case the money is raised by the sale of lands bound by the judgments, are paid, not *pro rata*, but the first is paid in full, and the next after, &c., till the fund is exhausted; and it may happen, that the last gets nothing. The act of assembly of 1794, was intended to give a preference to judgment creditors, over bond and simple contract creditors, where the money was collected from a fund, or funds, not bound by the judgments in the lifetime of the debtor. But it was not intended, and has not been held, to take away the right which he who obtained the first judgment, had to the proceeds of the lands bound by his judgment. It did not intend, that judgments should be paid *pro rata*, when the fund was raised from the sale of lands bound by the judgments. The first judgment creditor had a right, of which he could not fairly be divested; and would not be by anything less than express legislative provision. But all rights are subject to limitation, in point of continuance, and are limited, unless exercised in some way, in all civilized countries. No well regulated government is without statutes of limitations. Our legislature have enacted, that a judgment shall cease to be a lien, unless certain proceedings are had on it within five years. It also provides, that the *seire facias*, in such case, shall be served on executors, administrators, &c. Its provisions are plain; its policy wise—it takes in this case. The bank lost its preference to the first moneys arising from the sale of the land bound by its judgment, by not proceeding, according to law, within five years.

Perhaps, if funds are collected from lands in other counties, not bound by any of the judgments, it may still be entitled to payment in the rank of judgments, in preference to debts of lower grade. But, that is not before us, and I give no opinion about it.

Judgment affirmed.

Cited by Counsel, 2 W. 56; 3 Barr, 352; 12 N. 29; s. c. 8 W. N. C. 247.

Cited by the Court, 15 N. 478.

By Act Feb. 24, 1834, s. 25, "all judgments which at the time of the death of a decedent shall be a lien on his real estate shall continue to bind such estate during the term of five years from his death" without revival. This Act is to be interpreted as relating to lands of which a defendant was seised at the rendition of the judgment; it operates upon subsisting liens more directly than upon the lands; therefore the fact that the land was conveyed after the lien attached and before the death of the defendant does not take the case out of the statute: 3 H. 39. And *vice versa* it has been held that the death of the *terre tenant* does not continue the lien of a judgment recovered against the former owner: 1 S. 204.

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Deardorf *against* Hildebrand.

IN ERROR.

Declarations by a principal in a bond to a witness, in the absence of the surety, that a judgment note, which he gave him to deliver to the party was to secure him, accompanied by proof, that the note was delivered to the party, and he entered up judgment and collected moneys thereon, are good evidence, as part of the *res gesta*.

WRIT of error to the Court of Common Pleas of *Adams* county. The plaintiff in error was plaintiff below.

Carothers and *Fuller*, for the plaintiff in error.
Stevens, *contra*.

The opinion of the court was delivered by

ROGERS, J.—There is but one point which we are called on to consider. Henry Piching executed the bond on which suit is brought, with the present defendant as his surety; and the defence is, that in consequence of a request which he made to Deardorf to proceed against Piching, &c., he, Hildebrand, is discharged from his liability. The plaintiff gave in evidence a judgment to the April Term, 1824, on a note, with warrant of attorney from Henry Piching to Jacob Hildebrand, dated the 30th of March, 1824; *fieri facias*, and money made to the amount of one hundred and eighty-one dollars and ninety-nine cents; and then offered to prove, that the note was executed by Henry Piching in the absence of Jacob Hildebrand, and that Henry Piching gave it to Samuel Piching, the witness, who is also a witness to the note, and further, offered to prove what Piching said at the time, was the consideration of the note, and what moneys it was intended to secure Hildebrand. That it was brought to the office by the witness, and judgment entered; it was then delivered to the said Hildebrand by the witness: That Hildebrand proceeded on the said judgment, and collected between two and three hundred dollars. This evidence was rejected, because it was the declarations of Piching in the absence of Hildebrand, not under oath, and which Piching was competent to prove. The defence of Hildebrand, resting on his character of surety, the evidence offered, was pertinent to the issue because, if Hildebrand received the money on account of his suretyship, he did not stand in the situation of a surety, about to pay money without consideration, but must be considered a principal to that amount. The note itself, does not show the

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object of giving it. This must be made out by testimony *aliunde*, and this may well be done, by the declarations made at the time the transaction took place. I look *upon this as a con- [*227] tinued transaction from the time of the execution of the note, until it was received, and acted on by Hildebrand. By accepting the judgment, issuing execution, and collecting the money, he affirmed all the previous acts. The declarations of Piching, although in the absence of Hildebrand, are properly part of the *res gesta*, and as such, are competent evidence, according to the uniform current of authority. It is no answer, to say, that Piching was a competent witness, and as such examined in the cause; for this answer would be equally good, if a valid one, whether Piching were present or not. The plaintiff might have proved the object of the bond, by the oath of Piching, but he is not bound to do so. The plaintiff has two ways of proving the same fact, each of which is equally good; and it is for him to determine, whether he will resort to one or the other, or both modes of making out his case. The declarations made at the time of doing a particular act, may generally be relied on with the utmost safety, as against the persons who were engaged in the transaction. Individuals do not often commit themselves, against their own interest. I look upon this precisely in the same way, as if Hildebrand was present at the time the declaration was made. It was made in the course of the business, and Hildebrand acting on it, is bound by the declarations of Piching. As the Court of Common Pleas rejected the evidence, we are of opinion there was error, and that judgment be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Wh. 44; 3 Barr, 88, 138.

Cited by the Court, 29 S. 501.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Ross, Garnishee of Ross, *against* M'Kinny, for the Use of Ross.

IN ERROR.

In a foreign attachment against A. as defendant, and a *scire facias* against B., executor of C., as garnishee, to recover a legacy bequeathed by C. to A., it is a good defence, that C. was surety for A., and the executor had been sued, and was likely to be compelled to pay the money; and the court will direct a conditional verdict for the plaintiff, to prevent issuing execution till the executor be rendered safe.

Query, if a legacy can be attached?

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ERROR to the Court of Common Pleas of *Perry* county.

The opinion of the court was delivered by

ROGERS, J.—This was a foreign attachment against Thomas Ross, in which the defendant in error, Samuel Ross, was garnishee. *John Ross, who was the father of Thomas [*228] Ross, left him a legacy of one hundred pounds, part of which is in the hands of Samuel Ross, who was the executor of the will; but which he claims a right to retain, because, he says, his testator, John Ross, was surety for his son, and that suit has been brought against him, as executor, and that the estate will have this money to pay. He claims a right to retain the money until the estate be indemnified. This case must be viewed in the same manner as if suit had been brought by Thomas Ross; for the creditors of Ross, are in no better situation than Ross himself. If an action had been brought for the legacy, the executor would have been entitled to a refunding bond, which must have been tendered and filed, before the commencement of the suit. But we will suppose this to have been done, and the defendant made defence, as here, would it avail him? It appears to me clear, that it would. It is a contingent liability, and it is easy to see, that unless the estate be secured from the legacy in the hands of the executor, they will have the whole money to pay, without any effectual remedy against Ross. It would be unjust that the executor should be deprived of a remedy which is in his hands, that Ross, or what is the same thing, his creditor, should recover the legacy, and that the estate should be put to their action against Ross, success in which, is at least doubtful. This contingent liability does not form an absolute defence, for peradventure, the money may never be paid. All the surety has a right to require, is a reasonable indemnity, which can be afforded him by a conditional verdict. Whenever Ross, or his creditor, renders the executor safe from the claim impending on the estate, then, and not till then, he is entitled to this money; and this I understand is all that the executor requires. Indemnify me from the claim, says the executor, and I am ready to pay over the balance of the legacy in my hands; and this is a proposition, as it appears to the court, highly reasonable. He requests that terms may be imposed upon the plaintiff, so as to prevent the estate from coming to loss. Every case of the kind must depend on its own circumstances. It is for the jury to judge, under the direction of the court, whether the defence be a pretence, to avoid the payment of the money, or a well grounded fear, that the estate will come to loss, unless permitted to retain. It is an equitable

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defence, depending upon a variety of circumstances, of which we must judge as they arise.

Whether a legacy be the subject of a foreign attachment, in Pennsylvania, we shall not determine, as the point was not raised in the Court of Common Pleas. In England, a legacy cannot be attached in the hands of an executor; because, it is uncertain whether, after debts paid, the executor may have assets to discharge it; because a legacy is not demandable, or suable at common law; and because, it may work a wrong to the creditors, who are third persons, and can have no day in court in the suit, to interplead. How far these reasons apply in Pennsylvania, we shall not decide, *as the cause will be remanded, and the executor will have the opportunity [*229] of raising the point in the Court of Common Pleas.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 5 R. 272; 2 Wh. 337; 11 H. 169.

Cited by the Court, 2 R. 53; 11 H. 170.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Ramsey *against* Linn, Executor of Fleming.

IN ERROR.

A judgment confessed on an amicable *scire facias* on a former judgment, is a valid lien against subsequent incumbrancers, though the original judgment did not legally exist.

WRIT of error to the Court of Common Pleas of *Cumberland* county.

The plaintiff in error was plaintiff below in an amicable action, to try the right to a sum of money raised by a sheriff's sale of land, situate in Perry county, on a *testatum* execution from Cumberland county. The question was as to priority of lien. The facts, which by agreement were stated, and to be considered as if found by special verdict, in substance were:

Perry county was erected out of Cumberland; the division to take effect on the 1st of September, 1820. After that day, viz., on the 4th of October, 1820, an action of debt was commenced in Cumberland county, by Fleming, the defendant's testator, against Jacob Fritz, the owner of the land in question. The suit was by summons. The writ was returned by the sheriff, "served;" and judgment at the January court following, was entered against Fritz, by default. This judgment was afterwards revived by *scire facias*; and upon it a *testatum fieri facias* was issued to Perry county, and entered on the records of that

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county on the 25th of May, 1825, and levied upon this land of Fritz, which, upon a *testatum venditioni exponas*, was afterwards sold for six hundred and fifty-two dollars, the money in question.

It happened, that the record of the suit of Fleming against Fritz, with the statement and papers, was transmitted to Perry county, entered on the record of that county, and at their first Court of Common Pleas, viz., on the 31st of January, 1821, there was this entry made by the court: Judgment entered in Cumberland county. Upon this judgment, or supposed judgment, thus transmitted, and thus existing, or supposed to exist in Perry county, an amicable, *scire facias* was agreed to, and signed by Fritz, witnessed by James Hamilton and William Ramsey, the plaintiff in error, and *filed in the court [*230] of Perry county on the 1st of March, 1824, as follows:

“James Fleming } “Amicable *scire facias post annum et diem*,
v. Jacob Fritz. } to revive a judgment, No. 108, November
Term, 1820, on the docket of the Court of
Common Pleas of Perry county. I agree
to appear to this amicable *scire facias*, and consent that the same
be entered of record as of February Term, 1824, and confess
judgment to the plaintiff, for the sum of seven hundred and
ninety-three dollars and seventeen cents, with interest from the
13th of September, 1820. All payments subsequent to the said
13th of September, 1820, to be hereafter allowed. Witness my
hand and seal, the 5th of February, 1824.

“JACOB FRITZ. [Seal.]

“Attest, } JAMES HAMILTON,
WILLIAM RAMSEY.”

The claim of Ramsey, the plaintiff in error, to the money, or part of it, was founded on a mortgage of the same land, by Jacob Fritz, to him, executed the 30th of October, 1824, to secure a debt of three hundred and eighty-four dollars, due by single bill. The mortgage was duly recorded on the day of its date. The court below gave judgment for the defendant.

Ramsey and Watts, for the plaintiff in error.—It is a matter too plain for argument, that the judgment in Cumberland county, on a suit commenced on the 4th of October, 1820, could create no lien on lands in Perry county. The original judgment was never transferred to Perry county, nor could it be by law. It was never entered in Perry county regularly, or otherwise. Thus, the first lien of Fleming’s judgment on the land in question, was by the levy on the *testatum fieri facias*, which was after the mortgage to the plaintiff in error. The judgment by confession on the amicable *scire facias*, was a mere nullity. No such

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former judgment existed as described in that *scire facias*. The subsequent proceedings of the defendant in error show, that he, himself, considered the *scire facias* in Perry county as a mere nullity. The Court of Common Pleas of Perry county had no jurisdiction, or power to take cognizance of a *scire facias* on a judgment in Cumberland. It is a rule of law, without exception, that a *scire facias* on a judgment, shall issue out of that court only in which the judgment was rendered, and in the same county. It is but a continuation of the original suit. 2 Tidd. Prac. 983, 1007; 2 Saund. 72; Whart. Dig. 363, No. 40; Penn v. Kline, 1 Peters's Rep. 446. Consent cannot give jurisdiction. The amicable suit was of no more avail than if it had been by adversary process. Here, if there might be a *scire facias* legally brought in one distant county, there might be many others entered in other counties by the same reason. If this can be tolerated, the confusion and injustice which must be produced by the practice, may be easily foreseen. The judgment by confession in Perry county, was not noticed. It was [231] mere deception, for it pretended on the face of it, to be founded on a record of the court, which record could not be found, and which, in fact, never existed. As to the notice to Ramsey, by subscribing as a witness, the law is as clear, that he is bound by no such signature, as the fact is, that he knew nothing of the contents of the paper.

The counsel who was to have argued on the other side, was stopped by the court.

The opinion of the court was delivered by

TOD, J.—I throw out of the case the fact of Ramsey having, eight months previous to his mortgage, subscribed as one of the witnesses to the confession of judgment by Fritz in favour of Fleming. He certainly ought not to be held bound to inquire into, and remember the contents of a paper, which he was accidentally called upon to attest as a witness. By the way, I do not admit, that the most perfect knowledge of the judgment would have made it good against Ramsey, if void otherwise. As to priority of lien, we take it to be clear, that the judgment in Cumberland county did not bind the land in Perry. The levy on the *testatum fieri facias* from Cumberland county would have bound the land, but it was subsequent to the plaintiff's mortgage. Therefore, unless the defendant's claim is supported, by the amicable *scire facias* in Perry county, it must fail altogether. The judgment upon it was some months prior to the plaintiff's mortgage. It would appear, from the proceedings, that the amicable *scire facias* has been almost abandoned, and condemned by the defendant in error himself. Yet, we hold it to be the

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first lien, and entitled to the money. If, instead of amicable confession, that judgment of revival in Perry county had been by default, on adversary process by writ, perhaps it would have been absolutely void; because, the rule of the common law clearly is, that a *scire facias* issues out of that court only in which the record of the judgment remains; and here the record and papers, though transferred in fact, were not legally transferred to Perry county. Perhaps there are some exceptions to this rule in Pennsylvania, by reason of inconveniences which could not exist in England, where the jurisdiction of the superior courts extends throughout the kingdom, and where the creation of new counties has been unusual. But, however that may be, it seems very clear, that all the parties interested, may lawfully agree to confirm an invalid transcript, or nugatory judgment, provided the confirmation is to be efficacious, and give a lien only from the time of the agreement properly appearing. We are all of opinion, that though there was legally no such record as mentioned in the amicable *scire facias*, in Perry county, yet the defendant, Fritz, was estopped by his confession. He admits the validity of the record, and such admission by him, if *bona fide*, is conclusive against all claiming *under him by [*232] title, subsequent to the confession. Such a confession of judgment, in every amicable action, admits the issuing of a writ, though in fact, such writ never existed. We concur throughout in the opinion of the court below.

Judgment affirmed.

Cited by Counsel, 6 W. 297; 3 W. & S. 351; 1 J. 421; 11 C. 407; 5 S. 240.

Cited by the Court, 7 Barr, 67, 257; 1 M. 365; 8 N. 410; s. c. 7 W. N. C. 191.

[CHAMBERSBURG, NOVEMBER 1, 1828.]

Ruggles and Others *against* Alexander and Andrew Gaily.

IN ERROR.

The certificate of a prothonotary, that a writ, declaration, or statement, cannot be found in his office, is admissible in evidence, to prove the loss of such papers.

The docket entries of a suit, appearance, plea, and issue, are admissible in evidence to show, that a suit has been brought; and whether the suit was an ejectment for a particular tract of land, may be proved by parol.

An agreement, admitting the defendant in ejectment to be in possession of the land in controversy, does not preclude the plaintiff from showing how the defendant got into possession.

If a deputy surveyor has included too much land within the lines of a survey, he cannot, without the knowledge and consent of the party for whom it

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was made, throw out a part, including cleared fields, and the best land. If he do so, the party injured is bound to apply for redress to the Board of Property, and obtain a resurvey. But, if after the survey is returned, and before application for redress is made, any third person acquires a right to the land thrown out, by actual settlement, or the purchase of a warrant, the party injured by the act of the deputy surveyor, cannot, especially if his application for redress has been long delayed, recover against such third person.

WRIT of error to the Court of Common Pleas of *Perry county*.

Watts and Penrose, for the plaintiffs in error.

Carothers and Alexander, *contra*.

The opinion of the court was delivered by

HUSTON, J.—On the trial of an indictment in the Court of Quarter Sessions of *Perry county*, against Alexander and Andrew Gaily, in which they attempted to defend themselves on the ground, that the place where the alleged assault and battery was committed, was their own land, &c., it appearing there was really a contest as to the ownership and possession of the property, it was agreed to withdraw the prosecution and enter an ejectment to try the right to the possession. This was approved of by the court. It is a course frequently pursued in *Pennsylvania*. A paper was drawn up and signed, of which the following is a copy:—

*“It is agreed, that an indictment, now pending in the Court of Quarter Sessions of *Perry county*, against Alexander and Andrew Gaily and others, be changed into an ejectment in the names of Alexander and Andrew Gaily against the said defendants, Eve Ruggles and others, who are admitted to be in possession of the land in controversy, viz., a tract of land of two hundred acres, more or less, situate in *Rye township*, in the said county, and adjoining lands of Michael Smith’s heirs, the said plaintiffs, and others. This agreement is not to affect the actual possession of either party as it now stands, until this cause shall be decided. The costs of the said indictment to abide the event of this ejectment, and to be paid by the losing party. This cause shall not be transferred into the Circuit Court. The defendants now plead not guilty, and issue is joined. The cause to be put down for trial, and tried at the next term, or as soon after as possible.”

This was agreed to by the counsel for the Gailys, by Mr. Smith, and by the counsel for the Ruggles.

On the trial of this cause, the plaintiffs gave in evidence:—

24th of February, 1786, warrant to John Gaily, for two hundred acres of land, including his improvements, &c., to pay interest from the 1st of March, 1780. 14th of May, 1790, a survey by the deputy surveyor of two hundred and two acres

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and one hundred and thirty-eight perches : returned to the surveyor-general's office the 1st of April, 1802. 24th of February, 1786, a warrant to Alexander Gaily, for two hundred acres, adjoining John Gaily : this did not call for any improvement, interest from date. 14th of May, 1790, a survey by the deputy surveyor of two hundred and twenty acres, returned to the surveyor general's office the 1st of April, 1802.

They then showed an order of resurvey, dated the 26th of November, 1805, purporting to be on a petition of Alexander Gaily, and reciting the above warrant and survey, and "that owing to the mistakes of the then deputy surveyor, the surveys of both the said tracts interfere with, and run into, or include part of an adjoining tract of land, held and occupied, or possessed by your petitioner, under, and by virtue of his improvement right." On this the board ordered a resurvey of both the tracts, in order to avoid interference with other lands adjoining ; to correct the errors and mistakes of the said former surveys, and to procure accurate returns into the surveyor-general's office.

They then produced from the office of the deputy surveyor, a general or connected draft of the two surveys above mentioned, as made on the ground by the deputy surveyor in 1790, (and proof, that the whole of the outer lines were run, and marked on the ground, and were found on the resurvey.) They also showed a warrant, the 13th of October, 1805, to Andrew Gaily, for one hundred and fifty acres of land, adjoining Alexander Gaily and Samuel Davis, calling for an improvement, and paying interest from the 1st of September, 1802. Also, a [*234] draft, showing, in connection with the resurvey of the warrant to John and Alexander Gaily, and the tract surveyed for Andrew Gaily, and which, though covering exactly the ground taken in on the two first warrants, by the deputy surveyor in 1790, yet located the two first very differently, and laid Alexander and John Gaily's so as to include the defendant's improvements ; and Andrew Gaily's warrant was so laid as to include a small part of the defendant's claim, situate a considerable distance from their house and actual clearing.

They then proved, that the lines of the connected draft of the two surveys in 1790, were found on the resurvey on the ground, and well marked, correctly surveyed, except an error of twenty perches in one line. They also proved, that Mr. Smith, father of Smith, the defendant, and under whom he and the other defendants claimed, was along at this resurvey, and saw the old lines, and said, he would take up some land outside of it—the defendants' claim is inside of it.

It appeared, that in 1790, the deputy surveyor had included

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six hundred and four acres in the survey made on the two warrants of the 24th of February, 1786, to the two Gailys: That he sent an assistant to re-examine the lines, alleging the surveys would not close: That the returns were not made, because the fees were not paid: That the deputy surveyor told one of the Gailys, he had inclosed too much land by fifty acres, and advised them to take a warrant for it. It also appeared, that in making his returns, he threw out some of the fields to the amount of between twenty and thirty acres, which had been cleared and cultivated before 1786: That Mr. Smith had reaped grain in those fields for Gaily, before 1786: That the fields have been occupied by the Gailys ever since, and are still: That no one of them actually resided on that part: That the land thrown out in making the returns, is better than that retained.

They also proved, that in 1805, the then deputy surveyor had told Mr. Smith, that the land in question was thrown out by his predecessor, in making Gaily's returns, and made a bargain with Smith to make a settlement on it, and Smith to put and keep a tenant on it, and the deputy surveyor to pay the court expenses, and they to hold the land in partnership; and, that the same deputy surveyor, after the trial in Carlisle, had told the Smiths to compromise.

The defendants then gave in evidence:—

“31st of December, 1807, application of Michael Smith for two hundred acres of land, adjoining Alexander and Andrew Gaily's. 18th of February, 1808, oath of Mr. Smith. 9th of March, 1808, a warrant to Mr. Smith for two hundred acres of land, including an improvement in the 1st of September, 1805, with interest from that date.”

The defendants further read the application of the plaintiffs for *the warrant to Andrew Gaily; the petition of Alex- [*235] and Gaily to the Board of Property for the resurvey; the connected draft of the three Gaily's surveys, returned to the Board on that order, and rejected by the Board; and the separate returns on the two Gaily's warrants, made in pursuance of the said order, both rejected by the Board of Property; 2d of October, 1808, a *careat* by Smith against those returns, which were not then made; 4th of June, 1810, a decree of the Board in the premises, deciding that the original returns on John and Alexander Gaily's warrants should remain unchanged, but not deciding on the rights under Smith's warrant and Andrew Gaily's.

There was much testimony as to the time when Smith's actual settlement on the land in dispute commenced, and as to what that improvement was; and it was fairly left to the jury,

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whether previous to taking out the warrant, there ever was an actual personal settlement on the land in question by Smith, with the intention of making it a place of abode, and the means of supporting a family, and grain raised; or, whether it was a plain attempt to evade the law, and the residence for a short space, and with long intervals, and witnesses prepared to come to the spot and see Smith and his wife in the cabin during the hour they spent in it. And the law was laid down on this subject as in *Bealer v. Baker*.

There was also proof of the building a house within the survey made for Andrew Gaily in the fall of 1805, and a residence in it till the time of trial; and no objection to the charge on these improvements. It appeared, however, that in 1808, or perhaps 1809, Ruggles moved into Smith's cabin under Smith, and lived there till 1816.

By section eleventh of the act of assembly of the 3d of April, 1792, it is provided, that on the determination of the Board of Property, on any *caveat*, the patent shall be stayed for six months, within which time, the party against whom the decision is, may bring his ejectment, &c., &c.: (perhaps this section only applies to decisions of the Board on titles commencing after the act.) The plaintiff, however, to show that it was no bar to their claim, offered to give in evidence the copy of a record in Cumberland county. The evidence offered, was the docket entry of the suit, the appearance, plea, and issue, the swearing of the jury, and their verdict for the plaintiff.

A motion was made for a new trial, on which there was no decision, and marked, continued till the time of the extract certified. The officer certified, that on diligent search, neither the summons in ejectment, nor statement could be found in his office: That what he had copied, was all that remained of record there; and offered to prove, that this ejectment was for the lands now in dispute. The court admitted the evidence, and the defendants excepted. This was one of the errors relied on. The plaintiffs next offered to prove, that in 1816, immediately [*236] after the trial in Cumberland county, *the defendants left the possession of the premises: That the plaintiffs entered into possession, and were in the actual and peaceable possession until a short time before the indictment, when the defendants by fraud and force got possession. This was objected to and admitted by the court. This was the next error relied on.

I shall notice these exceptions to testimony here.

In this state, our judicial proceedings are evidenced by the writ or summons which issues to the sheriff, on which he indorses his return, and the writ so indorsed is filed. A declara-

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tion is drawn, and this is filed by the prothonotary. The appearance of the defendant is entered on the docket on which the prothonotary had entered the names of the parties, and nature of the suit at the time he issued the writ. The recognisance of special bail, if there is any, is entered to this suit on the docket, and entered very briefly. The pleas, and replications, and issue, are entered on this docket, or rather, according to our usage, a short note of them is entered; and, unless in special cases, are never drawn up at length, or to be found anywhere else than on the docket. The swearing of the jury; their names and verdict are first entered in the minutes of the court book, but are transferred to the docket; and there the motions for new trials, &c., are found; and there the judgment is entered. In short the docket is our record, and contains everything except the writ, the *narr.*, and executions. To draw up the whole on a roll, or otherwise, to make out the recognisance of special bail, the pleas, replications, and issues, at full length, except in some particular circumstances, is unknown, since a copy of the docket is so far a copy of the record. If the writ, or *narr.*, is lost, the law, as to a record, or part of a record lost, is neither new nor disputed. But the objection here seems to be, that the proof of loss of the writ, &c., was only the certificate of the officer, and it was said the oath of some person who had searched for it, would have been better; and that a negative certificate is not known to the law. I have nothing to do with the laws of other states or countries, but it is the constant usage to receive a certificate of one of the officers of the land office, that a warrant, or return of survey cannot be found in their respective offices, and such certificate has been decided in this court to be sufficient to let in secondary evidence. So, if a deed is lost, a certificate of the recorder of the proper county, that it is not to be found on record in his office, is part of the proof made to let in secondary evidence of its contents. And in 13 Serg. & Rawle, there is a decision which goes the whole length of deciding this point; and further, there have been other decisions on this subject not yet printed. The evidence offered, however, did not show a judgment of the court. It was not necessary it should. It was only offered to show that a suit had been brought; and the docket entry of the suit, appearance, and plea, and issue, was sufficient for this; but it was said, what was shown did not prove it to be an ejectment for this land. To this I answer, that whether a former *suit was for the same [*237] cause of action, is often, too often, the subject of parol proof; and to be proved in no other way. In all actions of *assumpsit*, and, I may add, in all actions of ejectment, no other proof can be adduced.

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The next bill of exceptions was, admitting evidence as to the manner in which the defendants got into possession. And it was argued, that the agreement to enter this suit, in which, "it is admitted the defendants are in possession of the land in controversy," precluded this testimony. But we are of opinion, this was only intended to save the trouble of proving them in possession, at the trial. To admit the defendants to be in possession is one thing; to prove how they got, and whether they are entitled to possession, is another and very different thing. The right to possession is the matter trying, and this right can only be decided, by proving the nature of the possession, the time when, and the manner how it was obtained; in short, whether it is by right or by wrong. In this state, lands are often held exclusively by possession. If a man enter on vacant land, he acquires a right to it. If he enter on appropriated land, he is a trespasser. There was no error in admitting this proof.

Under an act of assembly of this state, and the practice of our courts, the defendants proposed no less than nine propositions to the court; on each of which, they were requested to deliver an opinion to the jury; and errors were assigned in the answers to these propositions. The first of these propositions included the point on which, in fact, the whole cause turned: and the answer was correct. It was proved so incontestably, as not to be disputed, that Mr. Lyon, in 1790, included the land in question in the survey made for the two warrants of John and Alexander Gaily. Under the circumstances of this case, and the facts proved, it is not material to inquire whether he could have returned the whole on these two warrants, then in his hands. In *Blair v. M'Kee*, 6 Serg. & Rawle, 193, it was said, that where a person has a right, by improvement fairly established and designated, a deputy surveyor may legally survey for him four hundred acres, and ten per cent. over, although his warrant does not call for so much. See also *Davis v. Kefer*, 4 Binn. 162. I think there may be cases in which this would be doubtful; but the general position is not questioned, and it is not material in this case; for the deputy surveyor did not so return, nor was he asked to do so. It was proved, that he told one of the Gailys that he had included too much, and must throw off fifty acres; but no proof that he asked them where he should throw it off, or that they directed him. His returns in 1802, show, that he did leave out of the returns a large portion included in the survey on the ground; and in this part so left out, were two fields, and part of two other fields, then, and ever since in the occupation of Gaily. The judge told the jury, if this part was left out by the direction of Gaily, or if

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after it was left out, they knew it, and assented to it, [*238] *they were bound ; but if done without consulting them, if they never assented to it ; if it included their cleared fields, and better land than some of what was included, they were not bound by this act of the deputy surveyor ; but that they were bound to apply for redress to the Board of Property, and obtain a resurvey : That if, after the return, and before their application for redress, any other person acquired a right to the land thrown out, by actual settlement, or purchase of a warrant, they could not, especially if they had delayed their application for redress a long time, recover from such person : That the return of the deputy surveyor must be taken *prima facie* to be right, and with their consent ; but that proof might be given, that it was not right nor by consent : That the jury were to decide on the matter, not from the facts selected by the defendants' counsel, but from all the facts and circumstances proved in the cause, and in this there was nothing of which the defendants have a right to complain. If the Board of Property refuse to give redress, their decision is not final. The matter may be brought before a court and jury, whose decision is by the eleventh section of the act of assembly of the 3d of April, 1792, to determine the rights of the parties, and to determine the further proceedings of the officers of the land office. The jury, (and a former jury also,) have found for the plaintiffs, and if this point is with the plaintiffs, all the others are also with him, or immaterial. If the plaintiffs had a right to this land by his original settlement, and warrant on that settlement, or on his other warrant of the same date, and a survey made on the said warrants ; no deputy surveyor could deprive him of it. A deputy surveyor must consult the owner as to the part to be thrown out, when it is necessary to throw out. He cannot at his pleasure decide what the owner shall keep, and what he shall lose, even of the woodland ; much less can he deprive a man of his cleared fields, and the best timber land. No intentional injustice is attributed to the deputy surveyor in this case, and I suppose there was none. I suppose he did it in his office, without knowing whether it was good or bad land which he threw out ; but that does not alter the case ; unless acquiesced in, it does not affect the right of the owner. To be sure, the owner is bound also to attend to this matter ; it is his affair, and it will not do to say, he did not know of his own return of survey. In a reasonable time he must make his objections, and he must not permit another person to expend money or labour without notice. But nothing of this kind occurred here. He was still in the occupancy of his fields, and he presented his petition before Smith, under whom the defendants claim, had

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made any progress. Smith knew, or suspected how the matter was, and what was to follow, for his first act was to engage with a partner who was to pay the expenses of the lawsuit: he was then anything but a purchaser without notice.

As to the small part claimed under the warrant and survey of Andrew Gaily, the court left the question, whether the improvements *of Smith, on which his warrant was obtained, to [*239] the jury; and even if his improvements had been *bona fide*, and if (which was doubtful,) his were began before Andrew's; yet they were at the same distance from each other; no boundaries of his claim had been designated; there was no notice to Andrew, that he was settling within bounds intended to be included in Smith's improvements; and if there was nothing more, I do not see his preference over Andrew. But when we consider that Andrew called for an improvement, made in 1802: That there was proof of an old improvement within his claim, though the witness did not state the date of it; and when we consider, that Smith's improvement, such as it was, was not on vacant land at all, but on land of Andrew Gaily's, there was nothing wrong in the charge or the verdict as to this part; for the facts, as to the improvements being *bona fide*, or colourable, were fairly left to the jury. And if Smith had no title at all, even admitting the land to be vacant, until he put Ruggles on the land in 1809, the subsequent residence of Ruggles could not relate back to divest the right, Andrew's right by settlement and warrant in October, 1805.

It is unnecessary to go through the other points. They only became material if those noticed were found in favour of the defendants. They were predicated on a statement of facts, which must have been found not to be a true statement of facts, or the verdict must have been the other way; or, on a supposition, that in law, the Gailys were bound by the survey, as returned. Now, they were not bound, except as stated above. There was, however, no error in the answers to them. The Court of Common Pleas, with great patience, followed each of them, and with precision, discriminated what the law would be in the event of the facts being found one way or the other. As the opinion on these points was peculiar to a statement of the circumstances very peculiar, and not likely to occur soon again, I shall not labour through the whole of them.

Judgment affirmed.

Cited by Counsel, 2 W. 298; 3 W. 313; 2 J. 228; 7 C. 354; 4 Wright, 166.
Cited by the Court, 4 Barr, 131.

END OF SEPTEMBER TERM, 1828.—WESTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—JANUARY TERM, 1830.

[PHILADELPHIA, JANUARY 1, 1830.]

Romig, Administrator of Romig, *against* Romig.

In an action of trover brought by administrators for certain bonds, given to the intestate by the defendant, who refused to surrender them, on the ground that they had been given up to him by the intestate, who was his father, the declarations of the intestate, made in the absence of the defendant, tending to negative the allegation of the defendant, were held not to be admissible in evidence.

In trover for bonds, the measure of damages is the amount which may be recovered on them.

Therefore, where an intestate had agreed to convey to the defendant a tract of unpatented land, by "a good deed or lawful conveyance," and bonds were given for the consideration-money, which bonds afterwards came into the hands of the defendant, in an action of trover for the bonds, by the intestate's administrators, the defendant may prove, by way of defence, that he paid for patenting the land, for the funeral expenses of the intestate, and that he had worked for the intestate, who had promised to pay him for his services.

THIS cause was tried before Mr. Justice Rogers, at a Circuit Court held in *Lehigh* county on the 15th of April, 1829.

The action was trover by Jacob Romig, administrator of Jacob Romig, deceased, against Peter Romig, for certain bonds, in the possession of the defendant, and alleged to belong to the estate of the intestate. On the 17th of March, 1818, an agreement was entered into between Jacob Romig, Sen., the plaintiff's intestate, and his son, Peter Romig, the defendant, by which the former agreed, in consideration of natural love and affection, for

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the maintenance of the said Jacob Romig and his wife, and the sum of fifteen hundred pounds, and also, of the defendant's portion, to convey to the defendant one hundred and twelve acres [*242] and thirty-eight perches of *land in Marenjo township, and a tract of wood land, consisting of twenty-eight acres and eighty perches, in Longswamp township, and to give him "a good deed or lawful conveyance for the same." Of the fifteen hundred pounds, two hundred dollars were to be paid down, and the residue in yearly payments of two hundred each, until the whole should be paid; and for these annual payments, nineteen bonds were given. Ten of them had been paid, and the remaining nine were the subject of the present suit. During the latter part of the intestate's life, the bonds were in his possession, but they were subsequently traced to the possession of the defendant, who, on demand being made, refused to deliver them up to the plaintiff, alleging they had been given to him by his father; to establish which he produced evidence. The plaintiff, on the other hand, produced evidence to destroy the defendant's allegation. It will be necessary, however, to state only such parts of the evidence as are connected with the points raised in this court.

John Butz, (whose evidence was objected to by the defendant's counsel, but admitted by the court,) testified as follows:

"I had a bond against Peter Romig, which I got of Isaac Klein. I had money to pay to Peter Romig, and I gave him this bond in payment. The bond was given by Peter Romig to his father. I had two bonds from Isaac Klein, which Peter Romig had given to his father. I cannot tell the amount of credit which I got. There was interest on the bonds. I am not sure, but I think there was a witness in the bonds. I think the amount due on the bonds amounted to four hundred and nineteen dollars. I delivered up these bonds to Peter Romig. I cannot say when it was, but I think it was the 9th or 10th of June, 1828. I had the bonds about a month, or a little better, in my possession. The principal sums of the bonds were two hundred dollars each. I cannot tell when they were payable." On being cross-examined, he said: "I own this land now. It is patented. Peter Romig patented the land. The plantation was patented by him. The wood land was patented before."

Philip Romig, another witness produced by the plaintiff, after having stated that old Jacob Romig had put into his hands, for safe-keeping, a number of bonds wrapped up in paper, that he did not see the inside of the bundle, but knew that it contained bonds, was permitted, notwithstanding the evidence was objected to by the defendant's counsel, to testify as follows:

"The old man told me to take care of the bonds for him; he

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could not always carry them in his pocket. At that time the old man lived with Peter. I cannot tell how long this was before the old man's death, but it may have been three years and a half. The bundle was as thick as this book, (Wharton's Digest,) may be not so thick, neither. The bonds were with me about two years, be the same more or less. The old man then told me I should give him the bonds; he wanted to see something in one of the bonds. I *delivered the bonds to [*243] him. He did not say what he wanted to do with the bonds.

Abraham Romig was also called by the plaintiff's counsel to prove what the intestate had said to him relative to the bonds in question. His evidence was objected to by the defendant's counsel, but admitted by the court. It was as follows:—

"I lived in Allentown. The old man and Peter came to my house. The old man stayed at my house. He came in, and complained of feeling unwell, and that he was sued by Dr. Mathews, and he should have bail, and had none. I said Peter would enter special bail for him. He said he would not do it. Then I said he should remain at my house and I would go to Peter. I did, and told him he should go bail for his father. Peter said he would not do it. I said to him, he could do it; it would not injure him. Peter declared he would not do it. I went back to the old man at my house, and asked him if he had no bonds against Peter. He said, yes; he had fifteen in his pocket. I told him I would give him advice: he should go to Mathews and give him of those bonds and get free. He went, and after a while he came back, and said he was now clear. He had traded a bond for the debt. The old man said the bonds were each for two hundred dollars. I think this was five years since."

The plaintiff offered in evidence the record of a judgment obtained on the 5th of April, 1824, for one hundred and sixty-two dollars by Mathews against Jacob Romig, the intestate, and the record of another judgment for ninety-five dollars and eighty-five cents, obtained the 8th of September, 1825, by Frederick Wolbert against the said Jacob Romig. Both these records were objected to by the defendant's counsel, but the court permitted them to be given in evidence.

The defendant, as part of his defence, alleged, and gave evidence to support the allegation, that he had worked for his father during the period of sixteen years after he came of age, and claimed twelve hundred dollars for his services. He also proved, that, since the institution of this suit, he had paid four hundred and forty-three dollars and seventy-six cents for obtaining patents for the lands, for which the bonds were given. He also

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offered to prove that he had paid the funeral expenses of his late father. This last mentioned evidence was objected to by the plaintiff's counsel, and the court rejected it.

At the close of the trial, His Honour charged the jury in substance as follows :—

“ This is an action of trover, and the plaintiff's claim is for the taking and conversion of certain bonds. The action is founded on a fiction of law which supposes a loss of the article in question, and a finding by the defendant. But the action is, in fact, to try the right of property.

“ The question is, whether the plaintiff or defendant is entitled to the property. It is purely a question of property, not a [*244] question *of larceny. The defendant may have got them by gift ; but the burden of proof lies on him. It is necessary for the defendant to prove how he got the bonds, and the ordinary proof would have been very plain. The presence of a witness at the transaction, or declarations by the deceased, that he had given them to him : this proof should be expected by a jury. The whole burden of proof does not lie on the plaintiff, but on the defendant. There may be circumstances to induce the belief without this express proof. But such proof of circumstances should be satisfactory.

“ The defendant relies on the bonds being in his possession, cancelled ;—the declaration of the deceased to other persons of his intention, and the defendant's own declaration.

“ It appears that Peter Romig is in possession of the bonds. I regret that the old woman has been examined : there were conversations between her and the other witnesses, and they contradicted her as to certain other matters.

“ You need not investigate the matter of how the defendant got the bonds. The question is, in whom is the property of them. Evidence has been relied on, as showing the intention of the deceased to give the defendant the bonds. The intention to give is one thing, the actual giving another. All the confessions of a party are to be given in evidence ; but the jury are not bound to believe all. You can examine, and adopt what you please, and reject what you please.”

[His Honour here stated the facts which occurred at the funeral, as detailed by the witnesses.]

“ Peter, acknowledging that he had the bonds, gives different accounts of how he got them. To one he says he got them in the summer, when it was rainy ; to another two or three weeks before. To another one or two weeks ; and, to another, he says he got them on the 25th or 26th of September. We should have expected a uniform statement from him, giving the same account at all times. At one time he says the bonds were un-

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cancelled; at another, that the old man tore the name out. If he has given different accounts, you will say what reliance you will place on any of them. It would be dangerous to establish a gift under these circumstances. If so, who would be safe? It would be holding out a temptation to fraud, to the prejudice of others. I ask you, as members of society, to reflect seriously on this.

"If Peter has failed in the proof of the gift, the remaining question is the measure of damages. By the contract entered into on the 17th of March, 1818, the most material is, that the defendant was to pay his father four thousand dollars, two hundred down, and three thousand eight hundred in gales of two hundred each, every year. Nineteen bonds were given, payable from February 1st, 1819, to 1837, two hundred dollars each, without interest, till due.

"The defendant has only produced ten bonds which are paid. Nine are not paid, and the defendant should account for them. The *measure of damages is only what is the present [*245] worth if they are not paid: if paid, the damages are merely nominal.

"As to the question raised by the defendant that he ought to be paid for his services, the probability is, that that was settled in the contract. But, if it was not, it cannot be tried here. The defendant should have given up the bonds, and he could have set that claim up as a defence to suits on them.

"So, too, as to the patenting of the lands—the defendant should show that the deceased was to patent the land for him; if he did, it would not be a payment of the bond, but a defence to a suit on the bond."

A verdict having passed for the plaintiff, the defendant's counsel moved for a new trial, for which he filed the following reasons:—

1. The judge erred in admitting the declarations of the intestate made in the absence of the defendant.

2. The court erred in permitting the plaintiff to give evidence of the contents of the bonds, no notice having been given to produce them, and no evidence having been given of their due execution.

3. The court erred in admitting in evidence the record of the suits of Mathews against Jacob Romig, and Wolbert against Jacob Romig.

4. The court erred in refusing to permit the defendant to give evidence of the amount of the funeral expenses of the deceased paid by him.

5. The court erred in charging the jury that the burden of proof lay on the defendant to show that the bonds were paid by, or given to him; and that, as there was no witness present, the

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proof of circumstances ought to be very full and satisfactory to satisfy the jury that the intestate gave them up to him; the bonds being in the defendant's possession cancelled.

6. That the court erred in charging the jury as to the measure of damages, supposing the defendant to have established the fact, that he was entitled to claim from the intestate the amount which it would cost to patent the lands: and that he had performed services for his father for which he had not been recompensed, which, together, amounted to a larger sum than the present value of the bonds in dispute.

7. That the court erred in saying that the defendant was answerable for the bonds due in 1829, when there was no proof of any such bonds ever having been executed, or having come into the possession of the defendant.

8. That, supposing the plaintiff was entitled to recover, the verdict is too large in amount.

His Honour overruled the motion for a new trial, wherefore the defendant appealed.

J. M. Porter, for the appellant.

1. The declarations of the intestate in his own favour, made in the absence of the defendant, were erroneously admitted. [*246] Such *evidence is excluded, in general, by a rule as familiar and well established as any known to the laws; and there is nothing in the present case to form an exception to it. If these declarations were intended to affect the defendant, they were clearly not evidence; and if not, they were irrelevant, and consequently inadmissible. It is impossible to calculate where the mischief will end, if the declarations of a party, or of those under whom he claims, can be given in evidence. The intestate and the defendant were, so far as regards this transaction, mere strangers to each other: it is, therefore, an error to say that the declarations given in evidence were those of a person under whom both parties claimed. The plaintiff claimed under the intestate, but the defendant did not. His defence rested on having paid the bonds, which was shown by their being in his hands cancelled. *Blight v. Ashley*, 1 Peter's Rep. 15; *Scull and Others v. Wallace's Executors*, 15 Serg. & Rawle, 231; *Willis v. Church*, 5 Serg. & Rawle, 190; *Gray v. Goodwin*, 7 Johns. 96; *Wilson v. Boerem*, 15 Johns. 290.

2. Mr. Porter was about to argue, that evidence ought not to have been admitted of the contents of the bonds, without a previous notice to produce them; but the court having intimated that they considered it settled, that when an instrument is the subject of the suit no such notice need be given, he abandoned the point.

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3. The measure of damages in trover, is the value of the thing converted. The value of a bond is the amount which can be recovered on it. Hence it follows that, when the defendant has claims upon the plaintiff which will extinguish part of the sum originally due upon the bond, the standard of damages must be the balance remaining due. Where his claims absorb the whole amount, as in this case, the damages are merely nominal. The judge was, therefore, wrong in excluding the evidence offered by the defendant of having paid the funeral expenses of the intestate, and in instructing the jury that his claim for services and patenting the land did not constitute a defence in this suit. *Heck v. Shener*, 4 Serg. & Rawle, 249.

4. Another part of the charge did great injustice to the defendant: it was, that although the bonds lying in the defendant's hands were cancelled, the burden lay upon the defendant to show how he got them. This is in direct contradiction of two decisions of this court, which establish the position, that possession is *prima facie* evidence of payment. *Zeigler v. Gray*, 12 Serg. & Rawle, 42; *Weidman v. Schweigart*, 9 Serg. & Rawle, 385.

Davis and *T. Sergeant*, *contra*, were desired by the court to confine their arguments to the points, whether the declarations of the intestate were admissible in evidence, and whether the matters of set-off, relied upon by the defendant, constituted a defence.

1. They referred to the evidence of Philip and Abraham Romig, and after recapitulating it, observed that there were many exceptions to the rule by which the declarations of a party were excluded. It would often be impossible to show the circumstances *under which an act is done, or the intent of the party in doing it, except by his declarations at the [*247] time. For this reason the declarations of a bankrupt are admissible to show intention, as part of the *res gestæ*. Here the declarations of the intestate were part of the *res gestæ*; they tended to show the character of the whole transaction. They were, moreover, evidence, as coming from a party under whom the defendant claimed.

2. To permit the defendant to deduct the money paid for patenting the land, even in an action on the bond, would be to permit him to break in upon the shares of the other children, which ought not to be done. But supposing such evidence proper in a suit on the bond, it by no means follows that either this, or any other matter relied on by the defendant, can be received in an action of trover for the bond. Disguise it as he may, it is an effort to introduce a set-off in an action for unliq-

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undated damages, and to force the plaintiff to try two issues, when he came prepared to try but one. The plea of set-off admits the plaintiff's right to sue, and that the defendant has committed a wrong. Can he then convert an acknowledged wrong into an act giving him a right? If he can, a man may always pay himself by seizing the property of his debtor, and thus a scuffle will be invited between creditors to get the first possession. A set-off in trover was never heard of, and is clearly not within the provisions of our defalcation act.

The opinion of the court was delivered by

SMITH, J.—The appellant has assigned eight reasons for a new trial; but, in the view I have taken of the case, it will not be necessary to consider the second, third, fifth, seventh, and eighth reasons, further than to observe, that we do not consider them sufficient in law for this court to set aside the verdict and judgment of the Circuit Court, and award a new trial. The first, fourth, and sixth reasons assigned for a new trial merit a more particular notice. And, in order to understand them, it may be proper to observe, that, on the trial of this cause, which was an action of trover to recover the value of certain bonds which the defendant had given to the intestate for part of the consideration-money of a tract of land, for which the intestate had agreed to give him "a good deed or lawful conveyance," the plaintiff, in his testimony in chief, was permitted to prove the declarations of the intestate, made to Philip Romig and Abraham Romig, the elder, in the absence of the defendant. The evidence of the first of these witnesses was, in substance, that the deceased, some years before his decease, whilst residing in the defendant's house, left with the witness, for safe-keeping, some bonds, which were wrapped up in paper. He told the witness to take care of them, for he could not always carry them in his pocket. That the bundle of bonds remained in his possession about two years, when the intestate called on him for [*248] the bonds, *saying, he wanted to see something in one of them. The witness delivered them to him. Witness never examined the bundle, nor did he know what it contained, except from what the deceased told him.

The testimony of the latter witness was, that the deceased complained to him that he had been sued, and that the defendant had refused to become his bail. That he asked the deceased if he had not bonds against Peter: the deceased said he had fifteen bonds, for two hundred dollars each, in his pocket. The witness advised him to transfer some of them to the creditor who had sued him, in satisfaction of the debt. That the deceased went away, and shortly afterwards returned, and said he had

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done so, and was now clear. This evidence was objected to, and its admission forms one of the grounds of the evidence of a new trial.

I do not see anything in this evidence, or in this case, to take it out of the general rule, that the declarations of one party, made in the absence of the other, are not evidence in favour of the party making them, although they are evidence against him, if his adversary chooses to use them as such. And that the general rule is so, I refer to 5 Serg. & Rawle, 190, 295, and 1 Peters's Rep. 15. There is nothing in the argument that the defendant was to be considered as claiming under the deceased, as it was alleged that the intestate had given up the bonds to him. Even as repelling testimony, after the defendant should have given evidence of a giving up of the bonds to him, it would not be admissible. The defendant could give in evidence the intestate's acts and declarations against him, and the plaintiff could not affect them by anything the intestate might have said or done at another time in the defendant's absence. A man cannot make evidence for himself. The case of Scull v. Wallace's Executors, 15 Serg. & Rawle, 231, is, in my opinion, decisive of this case; and so is 7 Johns. 95.

On the trial the defendant offered to prove that he had paid the expenses attendant on the funeral of the deceased. The evidence was objected to, and rejected. He then gave some evidence of his having worked for several years for his father, the plaintiff's intestate, and that he had promised he should be paid for it. For these services, for sixteen years, the defendant alleged there was due him twelve hundred dollars. He also proved, that the lands, for which the bonds were given, were unpatented; and that since the suit brought, he had paid four hundred and forty-three dollars and seventy-six cents to obtain a patent for them. The judge who tried the cause was of opinion, that the evidence produced did not substantiate the defendant's claim to compensation for services; nor did he think the defendant had proved that the intestate was bound to patent the lands; but that, had he made out such proof, he could not avail himself of it in this action, which was trover, founded on a tort, and that the true measure of damages was the amount which *the bonds called for, adding interest on such as [*249] were due, and making a discount to ascertain the present worth of such as were not due.

It is true this is an action founded in tort, and that set-off is only allowable in actions arising *ex contractu*, and were these things matter of set-off they could not be received. 4 Burr Rep. 2480, 2481. The claim for services, and for patenting the land, if established, went to destroy the consideration of the

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bonds; to show that they were given for more than was due; and was, therefore, evidence to defeat that consideration, and thus fix what was the true value of the bonds. The amount recoverable upon the bonds was the true measure of damages. Suppose a receipt indorsed on one of them for one hundred and fifty dollars, the balance remaining due would form the measure of damages in relation to it. It mattered not that the money for patenting the land had been paid since suit brought. It was not the payment of the money which showed the defect of consideration; the mere payment of money since the suit brought might not, strictly, have been evidence; it was the fact, that so much money was required to remove the incumbrance, and it matters not when he paid it. It was a satisfactory defence, when the action was commenced, and when discharged, was a payment in equity of so much money.

The agreement required the plaintiff's intestate to give Peter Romig, the defendant, a good deed or lawful conveyance for the lands. In *Dearth v. Williamson, Administrator of Welsh*, 2 Serg. & Rawle, 498, this court said, that by a lawful deed of conveyance in an agreement, might be fairly understood, a deed conveying a lawful or good title. The intestate was then to convey a lawful title, for which he was to receive the full value of the lands. He did not do so, for at the time of his deed to his son, Peter, the land was not patented; the legal title for it remained in the commonwealth—the purchase-money due to them, charged as a debt on the land; and was so, whether taken up by location, warrant, or settlement. So this court laid down the law in 9 Serg. & Rawle, 71, and 13 Serg. & Rawle, 307, and it is, moreover, evidently so, from all the acts made to enforce the payment of unpaid purchase-money, in which the land is looked to as the debtor. Peter Romig then paid the incumbrance which lay on the land, for which Jacob Romig had agreed to make a lawful and good title, and the payment thereof to the commonwealth, in whom the legal title was, formed a good defence to the bonds.

I consider the payment of the funeral expenses a direct payment, and as much a matter of defence *pro tanto*, as a sum indorsed upon one of the bonds would be.

For these causes, a new trial should be granted.

New trial granted.

Cited by Counsel, 2 Wh. 100, 405; 3 W. & S. 142; 3 Barr, 390; 8 Barr, 54; 1 J. 413; 2 C. 496; 2 Wright, 58; 3 S. 110; 26 S. 455, 496; 32 S. 426, s. c. 1 W. N. C. 160; 8 N. 472; 3 W. N. C. 211; 9 W. N. C. 401.

Cited by the Court, 2 W. 202; 9 N. 383, s. c. 9 W. N. C. 402.

*[PHILADELPHIA, JANUARY 14, 1830.]

[*250]

The Case of Torr's Estate.

APPEAL.

Administrators, on the settlement of an account of an insolvent estate, are not entitled to be substituted for a ground landlord, whom they have paid, and receive a credit in account for the money so paid, though the intestate covenanted to pay the rent; the land being the principal debtor, and the covenant a collateral security.

But, they are entitled to be substituted for creditors, by bond secured by mortgage, whom they have paid, and to be credited in account accordingly.

THIS case came before the court on an appeal from a decree of the Orphans' Court of the city and county of *Philadelphia*.

On the 19th of November, 1824, auditors were appointed by the Orphans' Court to settle and report upon the accounts of Margaret Montgomery, late Torr, and John Torr, Administrators of Josiah Torr, deceased. They reported, that the balance in the hands of the administrators for distribution at the time of filing their accounts, was one thousand two hundred and thirty-eight dollars and forty cents.

On the 20th of January, 1826, auditors were appointed to distribute the amount remaining in the hands of the administrators, according to law, who reported as follows:—

“That the amount remaining in the hands of the administrators for distribution, is one thousand one hundred and sixty-nine dollars and eighty-two cents, and that the administrators claim an allowance for taxes, due in the lifetime of Josiah Torr, but paid since his decease, of thirty-seven dollars and twenty-eight cents, and a *pro rata* dividend on the following sums, paid by them, viz. :

Ground rent,	\$300 00
Interest to M. Shotwell,	88 92
“ E. Barner,	270 00
“ M. & S. Fox,	120 00
	<hr/>
	\$778 92

“The amount of these several payments has been satisfactorily established, but the auditors believe they are not properly chargeable to this fund. The intestate left a large real estate, the rents of which have been received by the administrators, but are not brought into their account. The auditors are of opinion, that these sums should have been paid out of the rents

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of the real estate, on which the ground rent and mortgages are chargeable."

"The claim for taxes comes within the same rule, but this item was before the court on a former occasion, and was then disallowed.

[*251] "The auditors, therefore, apportion the moneys in the hands of the administrators as follows, viz.:

"Balance in their hands, \$1,169 82

"From which deduct the following expenses, incurred in the account:—

"1. Advertising, \$6 00

"2. Room, 6 00

"3. Fees of the clerk of the court, . 1 87½

"4. Auditor's fees, \$36

Drawing report, 10

— 46 00

59 87½

Balance remaining in the administrator's hands, \$1,109 94½

"Leaving, after all deductions, a balance of one thousand one hundred and nine dollars ninety-four and a half cents to be distributed, being sixty-two and two-thirds per cent. on the claims allowed by the auditors, to be paid to—The representatives of

"A. Barner, deceased, \$950 79 · Dividend, \$595 76

"John Torr, 820 50 " 514 19."

This report having been confirmed by the Orphans' Court, the administrators entered an appeal from the decree.

The exceptions taken in this court to the decree of the Orphans' Court, were:—

"1. The disallowance of the payment made by the administrators for ground rent, due on covenant, after the intestate's death.

"2. The disallowance of the interest paid to Mary Shotwell on her bond.

"3. The disallowance of interest paid to E. Barner on her bond.

"4. The disallowance of interest paid to M. and S. Fox on their bond."

Wheeler and Kittera, for the appellants, cited, *Hutton* 35; *Zouch v. Abbot*, 3 Burr. 1801; *M^r Kinney v. Watson*, 8 Serg. & Rawle, 347; 4 Johns. Ch. Rep. 619; *Van Rensselaer's Executors v. Platner's Executors*, 2 Johns. Ca. 17; *Kunkle v. Wynch*, 1 Dall. 305; *Reed v. The Commonwealth*, 11 Serg. & Rawle, 441.

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Jack and Randall, for the appellee, referred to Gordon's Law of Decedents, 163; Toller, 179, 280; Salk. 317; Howell v. Price, 1 P. Wms. 294; Talb. Ca. 53, Note; 2 Bro. Ch. Rep. 604; Evelyn v. Evelyn, 2 P. Wms. 664; Pollard v. Schaeffer, 1 Dall. 210; Hurst v. Rodney, 1 Wash. C. C. Rep. 375; Gordon's Law of Decedents, 131, 132, 133.

The opinion of the court was delivered by

GIBSON, C. J.—This case comes before us on the report of auditors, appointed to average the debts due by an insolvent estate, the administrators claiming to be substituted for the ground landlord, *whom they have paid, on the foot of a covenant by the intestate; and for creditors secured by bond [*252] and mortgage, whom they have also paid. As guardians of the children, they have received from the profits of the real estate, enough to discharge these incumbrances; and the question is, whether they are to be reimbursed out of these profits, or out of the personal assets.

It will not be contested, that in equity, both these classes would, though for different reasons, be thrown upon the land. A ground rent is emphatically a real incumbrance, and the covenant of the tenant a collateral security; consequently the personal assets are to be called in aid of the land, only when it is inadequate to payment of its own debt. A rent is essentially a reservation out of the profits; and so far is this carried in the case of a term which goes to the executor, that he is bound to apply them to the rent in preference to every other demand, at the peril of being answerable to the lessor for a *devastavit*. 1 Salk. 137. In covenanting to pay, the tenant relies on the land as the means of performance, nor does the estate which he gains in it increase the personal assets: so that it is impossible to put a case in which the land is more obviously or more conclusively the principal debtor; and being so, it is bound by every principle of justice to pay in ease of the personal assets, to which recourse can be had only to prevent an eventual failure of satisfaction. The doctrine on the subject is stated in Mr. Coxe's notes to Howell v. Price, 1 P. Wms. 294; Clifton v. Burt, Ib. 679, and Evelyn v. Evelyn, 2 P. Wms. 664; and the authorities in support of it, leave no doubt of the solidity of the rule. It is, therefore, not to be doubted, that equity would direct the heir to keep down this species of rent out of the profits.

Debts secured by mortgage are, in equity, also sometimes satisfied out of the land. The first object of a court of equity, where it can be accomplished consistently with the nature of the debts, is to produce satisfaction of all who have a claim on the assets; consequently, the creditors of an insolvent estate, who may have

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recourse to the land, shall not exhaust the personal assets in the first instance: and this is on the common principle, that one who has a lien on two funds, shall not take satisfaction in a way to disappoint another, who has a lien on but one. Consequently, where specialty debts, which are a lien on the land, have been paid out of the personal assets, the simple contract creditors will be substituted for the specialty creditors so paid, and admitted to the benefit of their securities. This is the doctrine of all the elementary books, and is particularly stated in 1 Mad. Ch. 499.

Such then being the principles on which assets are marshalled in equity, the question is, how far we are bound to give effect to them here? It seems to me, we are bound to do so, as far as they consist with our laws of domestic origin, whether established by statute, or usage and judicial decision. But with this qualification, we are as much bound by the principles of equity which [*253] were in force at *the declaration of our independence, and which we may execute without assuming a chancery power, not granted pursuant to the constitution, as we are by the principles of the common law. Equity is a part of our law; and I would just as willingly disturb the foundations of the common law, laid in the time of Lord Coke, as shake a principle of equity settled by Lord Talbot, Hardwicke, or Northington. We ought to disclaim everything like a discretion to adopt or reject, according to our notions of expediency; nor, if we had the power, is there one of those principles which I would desire to reject. However they may have been strained in particular instances, they are intrinsically just in their application to the most complicated cases. As we cannot hope to see a separate administration of equity, we are bound to introduce it into our system as copiously as our limited powers will admit. How far, then, do the rules for marshalling real and personal assets, interfere with any law of our own?

To a certain extent, the legislature has subjected lands to the payment of debts. By the acts of 1700, and 1705, they are liable to execution in default of the personal estate; and by the act of 1794, the lands of an intestate may be sold by order of the Orphans' Court to supply a deficiency of the personal assets; in analogy to which, the surplus proceeds of an execution may be brought into a course of administration. But the administrator has nothing in the land except a contingent power to sell; consequently, the heir who has the estate in the meantime, subject only to divesture by an exercise of the power, is entitled to the profits. And in accordance with this, it was undoubtedly held in *M'Coy v. Scott*,* that an administrator who has collected

* Ante, page *222.

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rents and profits which accrued after the death of the intestate, holds them as a trustee for the children, and not for the creditors; and this decision is supposed to rule the case at bar. There, however, there was no question of marshalling; it being barely held that the law which gives the administrator a conditional power to sell, gives him no power over the profits. That its provisions are too scant to cover a case like the present, would seem to me, no reason to restrain the principles of equity, which are competent to the object without the aid of any statutory provision whatever. It certainly ought not to follow, because the legislature has not thought proper to make the profits assets for all purposes, that they shall be assets for no purpose; nor that we should stop short of the relief which chancery gives in particular cases, because the legislature has not thought proper to provide the same relief in all cases. It is supposed that the order of paying debts prescribed in the act of assembly of 1794, confounds all equitable distinctions between real and personal assets. This is obviously unfounded, the difference between these as a primary and secondary fund, being distinctly marked and carefully preserved. In England, *the law requires nearly [*254] the same order of priority; yet, although chancery can no more dispense with a rule of the common law, than can our Orphans' Court with an act of assembly; yet, no one can suspect, that the rules for marshalling assets, interfered with this order. The legislature clearly intended no more than to regulate the distribution of a single fund among its peculiar creditors. In *Bell v. Newman*, 5 Serg. & Rawle, 85, the object of the act of assembly was declared to be equality of payment among creditors in the same degree; and, unquestionably, the object of marshalling the assets is precisely the same. By other provisions of the same act, the two funds are to be administered separately, the land becoming debtor to the general creditors only when the personal estate is exhausted. Here, then, are profits which, according to the principles of *M'Coy v. Scott* are not accessible to the general creditors, but which it is proposed to apply to the debt owing by the land. This, instead of interfering with the act of assembly of 1794, accords with its spirit and details, by enlarging the general means of satisfaction, instead of casting the burden which ought to be borne by the owners of the land, on those who, as regards these owners, are bound by no obligation, legal or equitable, to bear it. There is no conflict of creditor with creditor, but of creditors with heirs, who wish to benefit at their expense; and surely, it never was an object with the legislature to enable them to do so. It seems to me, therefore, that the credit claimed for payment of the arrearages of quit rent was properly disallowed. Had the admin-

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istrators been charged with the profits of the land, it would have been otherwise; but as they could be received by the accountants only in their character of guardians, the whole subject belongs to another account.

But the payments in satisfaction of the mortgage debts, stand on different ground. The covenant, or obligation of a decedent to pay a mortgage given originally for his proper debt, is not an auxiliary, but the principal security; the mortgage, though charged on land, being not a real but a personal incumbrance. *Howell v. Price*, 1 P. Wms. 294, note; *Clifton v. Burt*, *ib.* 679, note. And this holds in all cases where the assets are not deficient. But in case of a deficiency, equity compels the mortgagee to exhaust the means of satisfaction afforded by the land, that the personal creditors may have all the benefit to be drawn from the personal assets consistently with entire satisfaction of the mortgage debt, because at common law they are shut out from the land. Now it is obvious, that the foundation of their equity in England, fails here; the land being liable at law, as an auxiliary fund, to all sorts of debts, whether specifically charged on it or not. There is, therefore, no room for equitable interference on the ground of legal inequality. It is true, that the general creditors have not the same advantage in respect of priority, as a mortgagee who has a specific lien. Should he, however, elect to take satisfaction out of the personal assets, the land would be disincumbered, *pro tanto*, and [*255] its capacity to afford satisfaction *to the general creditors, proportionately increased. There might, indeed, be other and younger liens to prevent this; but then, the equity of the parties to be affected being equal, a chancellor would not interfere with the mortgagee's legal right of election. It seems to me, therefore, that the administrators, standing in the place of mortgagee, are entitled to a *pro rata* dividend of the personal assets.

HUSTON, J.—The administrators of Josiah Torr charged themselves with personal estate, including rents received, amounting to two thousand one hundred and eleven dollars and fourteen cents. They prayed credit for payments amounting to two thousand nine hundred and seventeen dollars and seventeen cents. Among the disbursements were some for repairs and taxes of the real estate and ground rents paid, and interest on bonds and mortgages; the remaining payments were of simple contract debts of the deceased. Exceptions were filed to this account, and it was referred to auditors, who charged the administrators with goods and debts of the deceased to the amount of one thousand five hundred and forty-eight dollars and forty-

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two cents, and gave them credit for some small matters, and found a balance against them of one thousand two hundred and thirty-eight dollars and forty cents; and they say they have prepared the foregoing, which comprises the several items allowed by them. The administrators have, as it appears, paid considerable sums of money to different creditors of the intestate, but the estate not being solvent, all such payments have been disregarded, and the administrators were remitted to the future audit, for distribution, for any credit claimable by them on account of them, (I suppose on account of these payments to creditors.) The auditors report that the balance in their hands for distribution at the filing of their account was one thousand two hundred and thirty-eight dollars and forty cents. This report was confirmed in 1824, and no appeal; but as it connects itself with a report to be made by other auditors, it has been mentioned here. Auditors were appointed in 1826, and they reported that the administrators claimed credit for taxes accrued in the lifetime of the deceased, of thirty-seven dollars and thirty-eight cents; also, a *pro rata* dividend on the following sums paid by them, viz.:

Ground rent,	\$300 00
Interest on bond to M. Shotwell,	88 92
“ E. Barner,	270 00
“ M. & S. Fox,	120 00
	<hr/>
	\$778 92

And then adds: “The amount of these several payments has been satisfactorily established, but the auditors believe they are not properly chargeable to this fund. The intestate left a large real estate, the rent of which has been received by the administrators, *but not brought into their account; the auditors are of opinion that these sums should have been paid [*256] out of the rents of the real estate on which the ground rent and mortgages were chargeable. The claim for taxes comes within the same rule, but this was before the court on the report of the former auditors, and was disallowed.”

I am unfortunate in having formed my opinions of the powers and duties of executors and administrators, and the powers and duties of our Orphans' Courts, from our own acts of assembly, and from what was the practice under these acts, universally, until 1815. I say I am unfortunate; for it is a misfortune to compose one of a court, who in one particular, and that depending, as I suppose, on positive enactment, adhere to decisions, in my opinion, directly contrary to legislative provisions. Having delivered my opinion in *M'Coy v. Scott*, as to the right and duty

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of administrators, where it is necessary for payment of debts, to apply rents and profits of lands to pay them, I shall say no more on that subject. The present case, however, presents enough for observation besides that. And first, this court decided in the case of John Reed's appeal, that the Orphans' Court had no power to decide, at the settlement of an administrator's account, on a *devastavit*: That if the administrator showed that he had paid away all the goods and chattels, rights and credits left by the deceased, to persons who were really creditors of the estate, the Orphans' Court might pass the account; and if any creditor, who alleged himself to be injured, sued the administrators, the question of misapplication of funds, and of *devastavit*, would be decided by the Court of Common Pleas. Here the very reverse is done. The Orphans' Court appoint auditors to state the administrators' accounts, who do so, but give them no credit for the payment of any debt of the intestate, whether due on specialty or by simple contract; and for this singular reason, (I quote the very words,) "but the estate not being solvent, all such payments have been disregarded, and the administrators were remitted to the future audit for distribution, for any credit claimable by them." Palpably, this account settled nothing, and might have been rejected for this reason; but when the second auditors sat, their report, in fact, completed what should have been done by the first auditors. The second auditors were different persons; and their proceedings are not only different, but inconsistent, yet both are affirmed.

The first auditors say, the rents, issues, and profits of the land cannot be brought into the administrators' account, and they reject these matters from both sides of the account. The second auditors say distinctly one of two things, either that these rents and profits ought to have been brought into the account, and be set opposite the payment of ground rents, and interest on bonds and mortgages, or that an administrator must not pay taxes due by the intestate, or money due on a lease, where there is an express covenant by the intestate; and, that the administrator is not bound to pay a bond debt, if there is a mortgage to secure the debt.

[*257] *I have said before, this court decided in *M'Coy v. Scott*, that rents could not be brought into an administrator's account; that is, that the Orphans' Court had no power to charge him with the rents, even where he has received them, and at the time of settlement has the money in his hands. But these auditors have, in effect, charged the administrators. They say distinctly, the administrators have paid seven hundred and seventy-eight dollars and ninety-two cents of ground rents

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and mortgage debts, but they ought to have paid this with rents received. In point of fact, the rents were less by more than two hundred dollars than seven hundred and seventy-eight dollars and ninety-two cents; so that the administrators are not only deprived of a credit equal to the rents said to have been received, but also of two hundred dollars more; because, to use the words of the last auditors, these sums are not chargeable to this fund.

In England, it is true, simple contract debts do not bind the lands of a deceased. They must be recovered from personal estate, or they are lost. Debts by bond, in which the heir is named, bind lands. And if the bond creditor gets his debt from personal estate, the chancellor puts the simple contract creditors in the place of the bond creditor, to affect the land; in other words, the bond debt being a lien on the land, and the simple contract debt not a lien on it, the chancellor will compel the bond to be paid out of the land, at least, so far as to leave enough of personal estate to pay the simple contract creditors, and this is called marshalling assets; that is, compelling each debt to come from the fund which it alone can affect. But in this country, every debt equally affects the real and personal estate of a deceased. A judgment for a tradesman, or shop-keeper's account, sells land, if there is no personal property, just as a judgment on a bond, recognisance, or mortgage does; or, the Orphans' Court decree a sale to pay the one, as well, and as readily as to pay the other. Is there, then, any meaning in the words, not chargeable to this fund?

This is not all; the auditors struck out all payments on simple contract debts. The court had none before them. The administrators, then, claimed credit for the payments above stated. The credit was refused them. What are these administrators to do with the personal property? They must not pay the bonds, because there is a mortgage to secure that money; and they must not pay it to simple contract debts, for there are bonds. The whole of the money, says the Orphans' Court, must go to two bond creditors, who have no mortgage. Now, it is part of the case, that all the lands have been sold, and have not satisfied the money due on the mortgages. The Orphans' Court, however, decided, that the residue on these bonds and mortgages was not entitled to a *pro rata* allowance. One other judge of this court, however, agrees with me, that the administrators are to be allowed for their payments on the bonds; but a *majority of the court say, he is to have not even a *pro rata* allowance for the ground rent, or for the taxes. [*258]

The facts are, Josiah Torr, the intestate, was the lessee. He executed the lease, and in it an express covenant, binding him-

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self, his heirs, executors and administrators, to pay the rent; subject to this he had the property in fee. Subsequently to this, he mortgaged the property. Now, in the first place, if the ground rent had not been paid by the administrators, it would have come in prior to the mortgage debt, and so much the more of the latter would have been unpaid; but also, in this case, it was an express covenant under seal, a debt by specialty, which the administrators were bound to pay. If an action of debt, or covenant had been brought on it, such action could not have been brought against any other than the administrators. I know of no case in which the heir, as such, can be sued in this state for a debt due by his ancestor. He may be named as a terretenant in a *scire facias* on a mortgage, but the executors or administrators must be sued, and a judgment had against them before the land can be touched. If there are no administrators, the mortgagee or other creditor, must procure some person to administer. So, the heir may be sued in debt for rent, as assignee. If, then, the administrators had been sued on this covenant, they could not have resisted the suit; if they had pleaded *plene administraverunt*, still the plaintiff would have recovered *pro rata*, with other specialty creditors. The administrators, by *M'Coy v. Scott*, could not, if they had the rents in their hands, apply them to pay this or any other judgment against them. We have, then, a case where administrators must pay a debt contracted by the intestate, and cannot pay it out of either real or personal estate.

If Josiah Torr had not been the person who covenanted to pay this ground rent, if he had been the assignee of the covenantor, and only liable as occupant, and assignee in debt, and the property had gone into the hands of his heirs, perhaps, his administrators would not have been liable under our decisions.

1 Salk. 317, has been cited on both sides. If I understand that case, so far as it can be applied to the state of facts and law in this country, it is an express decision, that the administrators were liable to an action on this covenant, and must pay it *pro rata*; and wherever administrators are compellable by suit to pay, they may pay without suit.

As to the taxes due in the lifetime of Josiah Torr, and paid by the administrators, the law is, by act of assembly of the 11th of April, 1799, section fifteenth, if any person shall neglect or refuse to make payment, within thirty days from the time of demand, it shall be the duty of the said collector to levy the tax by distress and sale of the goods and chattels of the delinquent. If, then, the administrators had not paid this tax, the collector would have levied and sold a portion of the goods. The administrators could not have prevented this; they could

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not have replevied the goods distrained. Against *this plain act of assembly, we have, to be sure, one decision [*259] of this court, though the section was not referred to in the argument; and after this, there is nothing left for it, but the administrators must let the collector sell, and the children or creditors must bear the loss of a forced sale.

This doctrine of different funds to be applied to the payment of debts, according to different rules, comes to us under a respected and imposing name. So far as I can recollect, it is first distinctly mentioned by the late chief justice in the *Agricultural Bank v. Stambaugh*, 13 Serg. & Rawle, 299. The principle decided in that cause has not, I believe, been ever questioned; but the *dicta*, and they are only *dicta*, for they were not necessary to decide the cause, I entirely dissent from and deny. It is there said, if any creditor of a deceased gets a judgment, and levies it on personal property, he gets the whole of his debt, though other creditors of a higher class get nothing; and that after the personal assets are exhausted, the creditor may get a judgment *de terris*; and as to the proceeds of land sold, the creditors are entitled, according to the acts of assembly. To me, it seems, the first position is against the express words and spirit of our written law, and equally contrary to all prior decisions on that law.

In *Wootering v. Stewart's Executors*, 2 Yeates, 484, it was conceded by the counsel, that as respected personal property, the order of payment prescribed by the act of assembly must govern, but contended, that this did not apply to money raised by the execution of one creditor by sale of lands, which were there called an auxiliary fund, and were said not to have been in the contemplation of the legislature. The court decided, there was no difference. In *Prevost v. Nicholls*, 4 Yeates, 487, the opinion of the court was delivered by Yeates, Justice. The sum was large, the cause fully considered. That judge had the experience of half a century of full practice at the bar and on the bench. Of him, I can say, that although I have known many men, whose legal knowledge on some points, some branches of the law, was as great and as accurate as his, yet he knew more law than any person with whom I have been acquainted. In every department of the law known and used in this country, he was skilled; civil or criminal, local or general, common or statute law, he was at home in all of them. Where our acts of assembly had introduced practice or principles different from the law of England, he was pre-eminently superior. The habit of taking full notes of all decisions, of revising and comparing them, would alone have given him a vast advantage over those who depended on memory alone. In addition, he had a quickness of

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apprehension seldom equalled; powers of discrimination of the very first order; his industry never flagged, and his judgment seldom erred. In that case too, it was admitted, that the act of assembly must give the rule as to personal assets. He says, "It has from the earliest times made no difference, whether the assets [*260] arose from the sale of real or personal estate. *Though the personal representatives of the deceased might, by their *bona fide* acts, conclusively define the extent of the claims of the different creditors, they could not vary the vested interests of the different creditors, nor change the order of payment, for this would militate against the express provisions of the law. Neither did the report of the referees, nor the judgment of the court thereon, go further than to ascertain the amount of Mrs. Wilson's demand. They left the order of payment to be fixed by law, according to the nature of the debt. It can be of no moment which of the judgments is first in point of time against the administrators. Priority of payment must depend, in case of deficiency of assets, on the nature of the demand at the time of the death of the debtor."

The case *ex parte* of Meason, in 5 Binn. 167, establishes fully the same doctrine, and there Chief Justice Tilghman goes fully into the doctrine. An administrator is entitled to retain, because, if he could, he would give the first judgment to himself. He has the same rights as if he had the first judgment, but he has no preference, but comes in *pro rata* with other creditors of the same class.

The matter is of immense importance in this city, and the old and rich counties, where large personal estates, and still larger debts are common. A man dies, leaving a personal estate of twenty thousand dollars, and debt, to the amount of forty thousand dollars, and leaves his widow, or son, or some friend equally poor, his executor—can this executor, by confessing judgment, or letting a judgment be obtained for a *bona fide* debt, by simple contract, to friends, give these friends the whole property, to the exclusion of others of equal degree, or of creditors by bond or by judgment?

It has been said, that none but the executor or administrator can apply for auditors to apportion the estate. I doubt this. But it is not necessary to discuss that point. In none of the cases above cited, were auditors applied for or appointed, yet the court decided, in each of them on the application of those interested; and can they themselves appoint auditors to distribute the money, or rather, to apportion the sums to the several claimants, according to law? If the executor or administrator has paid the money to one creditor wrongfully, there may be difficulty; but if the money is raised by execution, I contend, the

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sheriff ought, at his peril, to pay it into court, at least, where he has notice from any creditor; and that when in court, it must go as directed by the act of assembly, without regard to the source from which it has been raised.

I equally deny the second position, that after the personal estate is exhausted, the creditor may get a judgment *de terris*, and sell the lands. He can sell them on his first judgment against the representatives of the deceased, by the act of assembly of 1700, expressly, and by the invariable practice since. Judge Washington first used the expression in 1 Pet. C. C. Rep. "All lands and houses whatever within this government, shall be liable to sale upon judgment *and execution obtained [*261] against the defendant, the owner, his heirs, executors or administrators, where no sufficient personal estate is to be found." Act of assembly of 1700. No second judgment is contemplated, and none has been used against executors more than against the defendant in his lifetime; and lands can no more be sold in the lifetime of the defendant, where personal property sufficient can be found, than they can after his death. There is no process to obtain this second judgment; no pleadings have been invented or used in the preparatory stages. The same execution may be, and often is levied on personal and real estate at the same instant, and after sale of the former, proceeded on as to the latter. No form of judgment *de terris*, known to the law, would be good. The creditor is not bound to wait for goods which may never arrive, after he has got his judgment *de terris*, which is always confined to particular lands, or at least, to lands; and, before he has taken out his execution, a ship may arrive with personal property sufficient, and then the lands cannot be sold. How is the creditor to get clear of it? There can be no such judgment in such a case. The expression is objectionable, as countenancing the idea of two distinct funds, to be governed by different rules. The farming utensils, or the ship, may be called an additional fund to the household furniture; but the expression is not correct. They all form but one fund, and only increase the amount of that fund. All the property is a fund for the payment of the debts of the debtor, living or dead. The personal property, if sufficient, to be exhausted first in order, and sold without the formality of inquisition or sheriff's deed.

I contend, then, in case of an insolvent estate, that by all courts, Orphans' Court or Court of Common Pleas, when the money is in court, the order prescribed by the fourteenth section of the act of assembly, is to be followed, whether the money was raised from real or personal estate: That the debt due on this lease, and on these bonds, were equally entitled to a propor-

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tion *pro rata*; and that the administrators who have paid part on the lease, should have been allowed for such payments made by them, out of the personal estate; and should have been allowed for the whole of the taxes due at the death of Josiah Torr. The collector could have levied and sold the personal property for those taxes. They were no lien on the land, and the administrators did right in paying them.

SMITH, J., concurred with the CHIEF JUSTICE. ROGERS, J., and TOD, J., not having heard the argument, took no part in the cause.

Cited by Counsel, 5 W. 230; 2 Wh. 301; 8 W. & S. 381; 1 Wr. 325; 2 Wr. 195; 11 Wr. 216, 287; 8 N. 404, s. c. 7 W. N. C. 10.

Cited by the Court, 1 H. 655; 10 H. 512.

It was said in 14 W. N. C. 322, that since the passage of the acts giving enlarged powers and jurisdiction to the Orphans' Court, this case is not authority.

[*262]

*[PHILADELPHIA, JANUARY 14, 1830.]

Douglass *against* The Commonwealth.

IN ERROR.

To elevate and enlarge a wooden building, so as materially to alter its character, is an offence within the meaning of the ordinance of the 6th of June, 1796, "to prevent the erection of wooden buildings within certain limits of the city of Philadelphia."

In an indictment under this ordinance, it is not necessary to aver, that the building was erected on a lot or piece of ground.

An indictment containing two counts, one charging the defendant with the erection of a wooden shop, the other with the erection of a warehouse, does not set forth distinct offences, punishable in different modes.

If the erection be by the tenant, an indictment will lie against him, and need not be against the owner of the building.

ERROR to the Mayor's Court of the city of *Philadelphia*.

On the return of a writ of error to the Mayor's Court of the city of Philadelphia, it appeared, that William Douglass, the defendant below, was indicted in that court for an alleged violation of the ordinance of the 6th of June, 1796, "to prevent the erection of wooden buildings within certain limits of the city of Philadelphia, by which it is enacted as follows:—

"Section 1. From and after the passing of this ordinance, no wooden mansion-house, shop, warehouse, store, carriage-house or stable, shall be erected or built within that part of the city of Philadelphia, which is comprised within the limits hereinafter mentioned, that is to say, from the river Delaware to the east side of Sixth Street, in those parts of the city included between the south side of Vine Street and the north side of Sassafras,

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or Race Street, and between the south side of Walnut Street and the north side of South, or Cedar Street, and from the river Delaware to the east side of Tenth Street, in that part of the city included between the south side of Race, or Sassafras Street and the north side of Walnut Street.

“Section 2. If, after the passing of this ordinance, any person or persons, shall erect and build, or cause to be built, any wooden mansion-house, store, carriage-house or stable, upon any lot or piece of ground, within those parts of the city hereinbefore specified, and shall be duly convicted thereof, upon indictment found against him, her or them, in the Mayor’s Court of the city of Philadelphia, every such person or persons, so offending and convicted, shall forfeit and be sentenced and adjudged to pay a fine of five hundred dollars.”

The indictment contained two counts, the first of which charged, that the defendant did make, build, and erect, and cause, and procure to be made, built, and erected, a certain wooden shop, between Pine and Spruce Streets, and Delaware Fourth and Fifth Streets, *and within that part of the said city which lies to the eastward of Sixth Street [*263] from the river Delaware, between the south side of Walnut Street and the north side of South, or Cedar Street.

The second count charged, that the defendant did make, build, and erect, and cause, and procure to be made, built, and erected, a certain warehouse, between Pine and Spruce Streets, &c.

The jury returned a special verdict in these words, viz. :

“The jury find that since the passing of the ordinance of the mayor, aldermen, and citizens of Philadelphia, entitled, ‘An ordinance, &c.,’ passed the 6th of June, 1796, the defendant became the tenant and occupant of a frame tenement, situate within the limits prescribed by the said ordinance: That at the time of his so becoming the tenant of the said building, the same was a wooden building, but that it has, within a short period been materially altered and enlarged by the defendant, by adding to the height thereof, four feet on the west and ten feet on the east, and making the lower story nine inches further to the southward, and by such other alterations and additions, the same has been converted from a blacksmith’s shop into a cabinet-maker’s warehouse and shop. The jury further find, that by the alterations and additions aforesaid, the danger from fire is increased. The jury further find, that the building was not originally erected by the defendant, but that he, as tenant of the same, made the alterations and additions aforesaid. But whether by the same, which the jury find to be material and extensive, the defendant erected and built a wooden building, within the true intent and

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meaning of the said ordinance, the jurors submit to the determination of the court. If the court should be of opinion, on the facts stated, that the same is a building, &c., the jury find the defendant guilty; if not, not guilty."

On this verdict judgment was rendered for the commonwealth.

Troubat, for the plaintiff in error, cited, *Dagget v. The State of Connecticut*, 4 Conn. Rep. 60; *Booth v. The State of Connecticut*, ib. 65; *Tuttle v. The State of Connecticut*, ib. 68; 1 Bl. Comm. 88; *Updegraff v. The Commonwealth*, 6 Serg. & Rawle, 5.

Kane, contra, referred to Johns. Dict., Erection.

The opinion of the court was delivered by

SMITH, J.—On the 6th of June, 1796, the mayor, aldermen, and citizens of Philadelphia, passed an ordinance to prevent the erection of wooden buildings within certain limits of the city of Philadelphia. William Douglass became the tenant and occupant of a certain frame building within the limits, and at the June sessions, 1826, was indicted in the Mayor's Court of this city, for erecting and causing to be erected, 1. A wooden shop. 2. A wooden warehouse; contrary to the provisions of that ordinance. On the trial, the jury found and returned a special [*264] verdict, upon which the court *rendered judgment against the defendant. He has thought proper to bring the proceedings for revision into this court, and has assigned for error, that the special verdict does not set forth any offence within the meaning of the law or ordinance, alleged to have been violated: That each count of the indictment contains and sets forth two distinct offences, punishable in different modes, and under different sections of the ordinance: That, in the indictment it is not averred, that the erection was on a lot or piece of ground; and lastly, that the indictment should have been preferred against the owner of the house, and not against his tenant.

The special verdict states distinctly, that after the enactment of the ordinance, the defendant occupied a wooden building, (then a legal one,) which, shortly before he was indicted, he materially altered and enlarged, adding to its height on its west side four feet, and on its east ten feet, and extending its lower story nine inches further to the south, converting it thereby from a blacksmith's shop into a cabinet-maker's warehouse and shop. The ordinance enacts, that no wooden shop, warehouse, &c., shall be erected or built within certain stated

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limits of this city. The meaning of this prohibition cannot be mistaken. And the question is, did the defendant erect such a wooden building as is prohibited by this ordinance, when he erected or altered, enlarged and added to the blacksmith's shop, what the jury have found, and as they have found it? It is contended, that he did not, as he only altered and enlarged the old frame building; in short, that all he did was to repair it, that the ordinance never was intended to destroy wooden houses then existing, but merely to prevent their increase. But I cannot view the material, important, and extensive alterations and additions in question, in the light of mere repairs. To repair a building is to replace it as it was, or to restore it after an injury or dilapidation, not to enlarge or elevate it, by raising it from one to two, or more stories, or extending its sides. When by his alterations and additions, the defendant converted the blacksmith's shop into a cabinet-maker's warehouse and shop, as set forth in the verdict, I would say, as the court below did, that he erected, or built a wooden building, within the clear intent and meaning of the ordinance in question, the main object of which was to diminish the danger of fires in a populous city.

Another objection, not more plausible than the one we have been considering, is the second error assigned. It is said, that it is not averred in the indictment, that the erection of the building was on a lot or piece of ground, although this is necessary to constitute the offence. But if the building mentioned, was not erected or built on a lot or piece of ground, on what was it placed, or on what does it stand? It is idle to answer on the blacksmith's shop, for that is no longer existing, but has been enlarged, altered and converted, in the words of the special verdict, into a cabinet warehouse and shop, and forms within the purview of the ordinance, a new wooden *building, erected on a lot or piece of ground, within the limits of [*265] this city. If the construction of the defendant were true, and this ordinance were only prohibitory of new frame buildings, erected on vacant lots or pieces of ground, the consequence would be, that on frame buildings of every kind, used heretofore for any purpose, and however small in their dimensions, or decayed and dilapidated, might be raised one or two stories, or more, extending the front or depth of the original structure without limitation; so that, although a new wooden building of the smallest size, erected on a vacant lot, would be indisputably illegal, yet the most spacious wooden building, warehouse, or factory, built upon an old ruined shed, would be conformable to the provisions of an ordinance, the professed object of which is to prevent, as much as possible, the occurrence of conflagrations, by prohibiting the future erection of edifices of wood. Such a

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construction is a perversion of the plain intent of the ordinance. We are accordingly of opinion, that the averment alleged to be essential, is not necessary.

I do not perceive, that two distinct offences, punishable in different modes, and under different sections of the ordinance are set forth in the indictment. Indeed, this error, as well as the fourth and last, was not pressed on the argument.

The indictment will lie against the tenant, for he, and not the owner of the house or lot, erected the building complained of. The words of the ordinance are, "If any person or persons shall erect and build," &c. Here it is found, that the tenant, the defendant, did erect and build. In this particular there is no error. We, therefore, are of opinion that the judgment of the Mayor's Court should be affirmed.

Judgment affirmed.

Cited by Counsel, 10 Barr, 380.

[PHILADELPHIA, JANUARY 14, 1830.]

Walters *against* Pratt.

APPEAL.

Where the sheriff sells personal property as the goods and chattels of the defendant in the execution, which are claimed by another, the court out of which the execution issues, cannot, under the act of the 16th of April, 1827, determine to whom the property belonged, and award the money accordingly. The remedy of the claimant of the goods is, by action against the plaintiff in the execution, or the officer, or both.

APPEAL from the decision of the District Court for the city and county of *Philadelphia*, under the act of the 16th of April, 1827, "relative to the distribution of money arising from sheriffs' and coroners' sales," &c.

[*266] *This was the case :—

On the 23d of October, 1826, a judgment in favour of Peter B. Walters against James D. Pratt, was entered upon bond with warrant of attorney annexed, both dated August 1st, 1826, in the sum of seven thousand dollars, conditioned for the payment of three thousand five hundred dollars; and on the same day on which the judgment was entered, a *fiery facias* was sued out to December Term, 1826. To this writ the sheriff returned, "Levied October 23d, 1826; and May 22d, 1827, sold all the personal property of the defendant, at Whitehall farm,

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for one hundred and forty-nine dollars and sixty cents, which money I now have in court."

On the 29th day of November, 1826, the defendant made an assignment of all his property, real and personal, to Isaac W. Norris and Jonathan Wainright, for the benefit of his creditors. This assignment, among other things, contained a condition, that before any creditor of the assignor should be entitled to receive any part of the property assigned to the said Isaac W. Norris and Jonathan Wainright, he should execute a full release of all demands against the assignor. Peter B. Walters, the plaintiff, executed such release, and received a considerable portion of the amount of his judgment from the assignees, several months prior to the issuing of the execution hereafter mentioned in the suit of the administrators of Joseph Kirkbride, deceased, against James D. Pratt.

On the 17th of May, 1826, two judgments were entered for John P. Kirkbride, Nathan Shoemaker, and John Paul, administrators, &c., of Joseph Kirkbride, deceased, against the said James D. Pratt, upon two bonds, with warrants of attorney severally annexed, for three thousand eight hundred dollars each; and on April 20th, 1827, a *feri facias* was issued upon each of the said judgments to June Term, 1827. To each of these *feri faciases* the sheriff made the following return: "Levied, April 20th, 1827, subject to a prior levy; and May 22d, 1827, sold all the personal property of the defendant, at Whitehall farm, for one hundred and forty-nine dollars and sixty cents, which money I now have in court."

On the 9th of June, 1827, the sheriff paid into court one hundred and twenty-two dollars and fifty-two cents.

On the 11th of June, 1827, the plaintiffs in Kirkbride's administrators against Pratt, before mentioned, obtained a rule to show cause why they should not take out of court, in virtue of their *feri facias* to June Term, 1827, the money paid into court by the sheriff.

On the 10th of September, 1827, the following rule was obtained, entitled in the case of Walters against Pratt: "On motion of James A. Mahany, Esq., rule to show cause why Isaac W. Norris and Jonathan Wainright, assignees of James D. Pratt, should not take out of the court money in this case." On the same day, the rule obtained on the 11th of June, 1827, by the administrators of *Kirkbride, was ordered to be discharged; but on the 6th of October, [*267] 1827, it was ordered to be restored to the motion list.

On the 29th of November, 1827, the administrators of Kirkbride obtained another rule, to show cause why they should not be permitted to take out of court the money paid in by the

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sheriff. This rule was in virtue of the other *feri facias*, issued by them against the said James D. Pratt.

On the 11th of May, 1828, the several parties were heard, when the court ordered the rule of September 10th, 1827, obtained on behalf of Isaac W. Norris and Jonathan Wainright, to be made absolute, and dismissed those obtained by Kirkbride's administrators, who thereupon entered this appeal.

Stroud, for the appellant, contended, that the District Court acted erroneously in ordering the money paid into court, to be paid over to the assignees of the defendant, instead of the administrators of Kirkbride, who were entitled to it by virtue of their two executions, which were duly levied on the property, from the sale of which the money arose. The question presented for decision is, whether, when goods have been sold, and the money paid into court, a stranger can come in and claim it. The cases of *The Insurance Company of Pennsylvania v. Ketland*, 1 Binn. 499; *Young v. Taylor*, 2 Binn. 228, and *Lewis v. Smith*, 2 Serg. & Rawle, 142, are conclusive, that it cannot be done. No case can be adduced, in which a party has been allowed to come in and claim the proceeds of sale. The remedy is by action against the sheriff. If it were otherwise, the constitutional right of trial by jury would be taken away. The sheriff, on the sale, both of real and personal property, sells merely the right, title, and interest of the defendant in the execution, and the court cannot, in a summary way, settle conflicting titles. But even in an action against the sheriff, there could be no recovery under the circumstances of this case, because the assignor was suffered to retain the possession. *Hower v. Geesaman*, 17 Serg. & Rawle, 251.

Arundel and Jack, contra.—The levy under which the appellants claim, was a second levy, made subject to a prior one. The creditor who made the first levy released, and the sheriff returned upon the appellants' executions, that he had sold subject to the original levy. The question is, whether the assignees are entitled to the goods levied upon, or the money arising from the sale of them. When the goods were levied upon by the appellants, they were either not the property of the defendant, he having assigned them, or they were subject to a former levy, and in neither case can the appellants have any claim. If they did not pass to the assignees, the first levy was in full force; it being settled law in Pennsylvania, that the lien of an execution on household furniture is not affected by the sheriff's permitting the property to remain in the possession of the defendant. *Levy v. Wallis*, 4 Dall. 167; *Lewis v. Smith*, 2 Serg. & Rawle, 159.

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But it cannot be disputed, that they passed *to the assignees. When the assignment was made, they were [*268] subject to an existing levy ; and the creditor who made it having released, the property immediately vested in the assignees, who did all in their power to bring it into possession. They had two years to settle their accounts, and the property in question was a small matter of furniture, which they did not take into their actual possession. If mere possession, under such circumstances, be evidence of fraud, there are few cases free from it. To push the rule as far as is now attempted, will have the effect of preventing people from accepting assignments.

Stroud, in reply, denied that the goods levied on were household furniture.

The opinion of the court was delivered by

HUSTON, J.—In England, when the sheriff levies on the goods and chattels of A., and B. alleges those goods and chattels belong to him, and not to A., the sheriff decides the ownership, to a certain extent, by an inquest. This has never been practised in this country, and was not attempted in this case. A legislative provision on this subject might be of general benefit to creditors, debtors, purchasers, and to the person claiming the goods.

It has been attempted to stay proceedings until the right to goods levied on was ascertained, but the courts have declined to interfere. See 1 Binn. 499, and 2 Binn. 228, *Young v. Taylor*, (Yeates's opinion.)

In this case the allegation is, that the goods sold were not the property of the defendant, but were the goods of S. W. Norris and Jonathan Wainright, and to them the court awarded the money. It seems to me, the case was not triable in the manner adopted. The act of assembly of the 16th of April, 1827, says, in all cases of sheriffs' or coroners' sales, where there are or may be disputes about the distribution of the moneys arising therefrom, the several courts under whose execution the money was raised, are hereby declared to have full power and authority to hear and determine all such cases, according to law and equity ; and proceeds to say, the trial may be by the court, or at the request of the party, the facts may be settled by a jury.

This law would seem to apply solely to cases where the goods or lands sold, are admitted to have been at the time of sale, the property of the defendant in the execution. If lands are sold, other persons may have liens prior to his on whose execution they were sold, and the court is to decide on the priority of those liens, and whether or not, the land was bound by them ; but, if

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A. B., a third person, comes, and says, his right to the land sold was better than that of the defendant, and that instead of bringing an ejectment to recover the land, he will take the money, neither the act above-mentioned, nor any law or usage known in the state, enables the court to decide on his title. So, on the [*269] sale of personal property, *the proceeds, admitting the property to have belonged to the defendant in the execution, may be claimed by the plaintiff in another execution from the same court, or a different court, or from a justice of the peace; and in such case the act applies, and the court must, in some of the modes prescribed, decide to whom the money is to be awarded. But if a third person denies that the defendant, as whose property the goods were sold, had any right to them, or that any of his creditors have any right to the money, the case of such a claim is not within the act above cited. The court cannot decide on his claim under that act or our law. He must sue the plaintiff on whose writ they were levied, or the officer, or both, as he shall be advised. The court can decide the right to the money, admitting the goods to have been the property of the defendant in the execution, but to decide on the right to the goods, and as a consequence, to the proceeds of them, a suit in the ordinary mode of action and trial is necessary.

The opinion of the court is, that there was error in the court below deciding in this case: That their judgment be reversed, and those who claim the property must pursue their claim, not under the act of assembly above cited, but by suit at common law. We give no opinion, whether they have, or have not, any right to these goods; though it may not be amiss for them to look at the case in 17 Serg. & Rawle, 251, *Hower v. Geesaman*.

Judgment reversed.

Cited by Counsel, 4 R. 400; 3 C. 210; 2 S. 299; 27 S. 235.

Cited by the Court, 2 Penn. R. 383; 7 W. 25.

[PHILADELPHIA, JANUARY 14, 1830.]

Velde against Levering, Guardian of Rauch.

IN ERROR.

A guardian who signifies his assent to the binding of his ward an apprentice, by signing and sealing the indenture, is not responsible to the master for a breach of the contracts of the apprentice.

A CASE was stated for the opinion of the District Court for the city and county of *Philadelphia*, from which this case came up on a writ of error, to be considered as a special verdict. It was as follows:—

[Veldé v. Levering, Guardian of Rauch.]

The plaintiff in error, who was also plaintiff below brought an action of covenant upon an indenture of apprenticeship, against John Levering, who was guardian of Solomon Rauch. By this indenture, which was made on the 1st of May, 1826, and the parties to which were Solomon Rauch, with the consent of his guardian John Levering, the said guardian, and Michael Veldé, the said Solomon Rauch was to serve Michael Veldé four years, five months and ten days. The usual covenants were followed by these *words:—"And for the true performance of [*270] all and singular the covenants and agreements aforesaid, the said parties bind themselves each unto the other, firmly by these presents." The jury found, that the apprentice had absented himself from his master's service on the 29th of July, 1827, without his leave, and did not return; and they assessed the damages at four hundred and fifty-four dollars and twenty-five cents, for this breach of covenant by the apprentice, subject, nevertheless, to the opinion of the court, on the liability of the defendant under the indenture. The court below were of opinion, that the defendant, John Levering, was not liable for a breach of the covenants in the indenture, committed by the apprentice, and accordingly rendered judgment on the special verdict for him; which the plaintiff now assigned for error here.

Jack and J. Randall, for the plaintiff in error, contended, that the guardian was a real, and not a nominal party to the indenture, which could not be assigned or cancelled, without his consent. This position is established by several decisions of the Supreme Court. *The Commonwealth v. Vanlear*, 1 Serg. & Rawle, 248; *Graham v. Graham*, 1 Serg. & Rawle, 332. The necessary inference from this doctrine is, that the covenant of the guardian is a substantial covenant, that the apprentice shall perform his covenants; for if he be not a real and substantial party to the indenture, it could be assigned or annulled without his consent. The law makes a distinction between a guardian and next friend, who is merely a nominal party to the indenture, and whose assent is not necessary to an assignment. The case of *The Commonwealth v. Leeds*, 1 Rawle, 191, was the case of a next friend, and not of a guardian. The concluding words of the indenture under consideration, have been repeatedly decided, to amount to a covenant, binding on the guardian. *Mead v. Billings*, 10 Johns. Rep. 99; *Whitley v. Loftus*, 8 Mad. 190; 2 Root, 316, 363, 466, 482; 3 Marsh. Rep. 301; 1 Mason, 78; *The Commonwealth v. Jones*, 3 Serg. & Rawle, 165; *Addis. Rep.* 301. In 2 Chitty's Pl. 274, a form of declaration will be found for this very breach of covenant on the part of the parent or guardian; and all the law on the subject will be found collected

[*Veldé v. Levering, Guardian of Rauch.*]

in 2 Chitty's Pl. 303, 304, note. The liability of the minor is created and limited by the act of assembly, but that of the parent or guardian is founded on the indenture which he has sealed; and if he be not liable on his covenants, the master is without remedy. The act of assembly intended to provide cumulative remedies, not to take away the remedy at common law.

The court declined hearing *Bethel*, who was to have argued for the defendant in error.

The opinion of the court was delivered by

SMITH, J.—The indenture in question, was not entered into under the statute of Elizabeth, by which the father is answerable for what is to be performed by the son; nor, of course, under any law of the state of New York, where, it would seem, [*271] that an apprentice *binding himself, with the consent of his father, and the father actually signing and sealing the indenture with the son, the father was bound for the son to the master, in case the son left his service before the end of the term; nor can the decisions, cited from the Connecticut Reports, avail, because the act of assembly of Connecticut, makes the father or guardian, personally liable on the covenants specified in the indenture, when he puts and binds the minor as an apprentice. The provisions of the act of assembly under which this indenture was executed, are different; and, therefore, the decisions on this subject in England, as well as those in New York and Connecticut, are inapplicable. But it is contended, that even in Pennsylvania, the guardian is liable, as he is not a nominal, but a real party to the indenture. That in some respects he is so here, is certainly true. He may be said to be a party to it when he signifies his assent to the minor's being bound, by his actual signature to the indenture, or by witnessing it, and thus complying with the requisitions of our act.

In the case under consideration, Solomon Rauch, a minor, with the consent of his guardian, John Levering, put himself voluntarily, of his free will, an apprentice to Michael Veldé, for a term of years, to learn the trade of a baker, and by the indenture, covenanted and promised to serve his master during the said term. The covenants in the indenture, are all by the apprentice, and not by the guardian; nor does our act of assembly require the guardian to enter into any covenants with the master for the apprentice. He does not bind the apprentice, but only allows him to bind himself. In *The Commonwealth v. Leeds*, 1 Rawle's Rep. 194, Chief Justice Gibson says that the practice has been, for the *prochein amy*, to express his assent by sealing the indenture: but that no one ever thought of having

[Veldé v. Levering, Guardian of Rauch.]

recourse to him on the contract, because the legislature has not required that he shall become a party, and because the covenants of the apprentice, though executed under the supervision of those whom the law may have set over him, are exclusively his own. As the act of assembly requires nothing from a guardian more than it requires of the *prochein amy*, in the binding of apprentices, the decision just cited must govern the present case. The judgment is, therefore, to be affirmed.

Judgment affirmed.

Cited by the Court, 7 Barr, 22; 1 H. 95.

*[PHILADELPHIA, JANUARY 14, 1830.]

[*272]

Palethorpe *against* Leshner.

IN ERROR.

Where a defendant, in custody on an execution, gives bond with surety to take the benefit of the insolvent laws, and forfeits his bond, a second execution may be issued against him. But if, when he is in custody under the second execution, the plaintiff discharges him from prison, without the assent of the surety, the debt is satisfied, and no action can be maintained against the surety upon the bond.

THIS was a writ of error to the Court of Common Pleas of the county of *Philadelphia*.

The suit was originally instituted before Alderman Binns, by the plaintiff in error, against the defendant in error, upon an insolvent bond. The facts of the case were these:—The plaintiff sued one Enoch Carter before the same alderman on the 18th of December, 1825, and obtained judgment for eighty-eight dollars and fifty-one cents, with costs. On the 13th of January, 1826, the present defendant, Christian Leshner, became special bail for Carter. On the 8th of November, an execution issued against Carter; and on the 15th of November, 1826, a bail-piece was taken out against him. He then entered into a bond to take the benefit of the insolvent law, with the defendant, Leshner, as his surety. This bond was, on the 7th of February, 1827, forfeited, because Carter did not appear to take the benefit of the insolvent law, according to the conditions of the bond. On the next day, an *alias* execution was sued out by the plaintiff against Carter, who, in consequence thereof was, on the 19th of February, arrested and imprisoned. On the last mentioned day, this suit was instituted before Alderman Binns against the present defendant, upon the insolvent bond, and judgment was

[Palethorpe v. Leshor.]

rendered for ninety-six dollars and nine cents, from which the defendant, on the 21st of February, 1827, appealed. On the 3d of March, 1827, Enoch Carter was discharged from prison, by the plaintiff's order to the keeper, without the knowledge, or assent of Leshor. The judge below charged the jury in substance, that upon the foregoing facts, the plaintiff could not recover, as he had lost his remedy against Leshor, upon the insolvent bond, by discharging Carter from prison; and this the plaintiff now assigned for error.

Dallas, for the plaintiff in error, cited, 2 Tid. Pr. 957; *Sharpe v. Speckenagle*, 3 Serg. & Rawle, 465.

Perkins, for the defendant in error, referred to *Smith v. Rosecrantz*, 6 Johns. Rep. 97.

The opinion of the court was delivered by

SMITH, J.—On the part of the plaintiff in error, the legality [*273] of *the *alias* execution of the 8th of February, against Carter, is denied; but it was correctly answered, that there is nothing in the act of assembly which forbids, in this case, the issuing of a second execution, if the plaintiff chooses. The act, when it took a debtor, arrested in execution, from the officer of the law, and thereby delayed the plaintiff from the fruits of his judgment, intended to give an additional security for the debt, and by no means to take from the creditor any security which he already had. When the debtor gives the bond with security, required by the act, and appears in court, according to the condition of his bond, but does not comply with the requisitions of the law, or the orders of the court, he is remanded to prison, and is there, on the original execution, upon which he was arrested. If the debtor does not appear, at the next term, the bond is forfeited. The debtor may then be fairly considered as having escaped out of custody, or as having fraudulently got out of the hands of the law; and this fraud, or non-compliance with the condition of his bond, cannot affect his creditor, who may, if he chooses, take another execution against him for his debt.

The effect which would be produced by the contrary doctrine, is not to be overlooked. A law, made for the relief of insolvent debtors, ought to be so construed as not to injure creditors. If, however, the opposite doctrine be true, the debtor, who can deceive the officer and the judge, and give an insolvent as bail, would be enabled to discharge himself of his debt, and keep his property; or, suppose he gives a solvent bail, who should, before the appearance day of the debtor, go on a voyage to China,

[Palethorpe v. Leshar.]

or on a journey to a distant land, might not the debtor in the meantime, live in affluence, and the creditor starve, or wait for his debt, until the bail returned; or, if the debtor remove from this to another country, leaving lands here, might he not draw the rents and profits without molestation from his creditor? To such consequences that doctrine might lead; consequences, which were surely not within the contemplation of those who passed our acts of insolvency. I am, therefore, of opinion, that a second execution in such case, may be issued, and that the execution of the 8th of February, was issued in this case legally. On this execution, Carter was arrested and imprisoned for twelve days, and was then discharged by the orders of the plaintiff. The question is, whether that discharge is an exoneration of Leshar from the insolvent bond to the plaintiff. I consider the defendant as unquestionably liable to the plaintiff, on the bond, when Carter did not appear in court, according to the terms of it. But on the same day that he took an *alias* execution against Carter, he sued Leshar alone on the bond, and proceeded with both processes. I have not been able to find an adjudged case in point. But in *Smith v. Rosecrantz*, 6 Johns. 97, it is said, that after the plaintiff has obtained judgment against the defendant, he has his election to have execution against the body of the principal, or of the bail; but when he has taken one in execution, he cannot resort to the *other, [*274] to have plenary satisfaction of his judgment. And I take the law to be well settled, that if a creditor, (an obligee,) discharges a principal debtor, or in any considerable degree lessens his responsibility, without consulting the surety, the surety is discharged. In the case before us, Carter was in actual confinement on a second execution, from which the plaintiff discharged him, without the knowledge or consent of Leshar. It is true, the modern cases decide, that an escape of the defendant in execution, either directly or indirectly, or by fraud, is not a discharge; yet, they all agree, that if the plaintiff himself discharges the defendant, he releases him from further execution of his person on the judgment, and releases all others, who were bound for the same. In *Sharpe v. Speckenagle*, 3 Serg. & Rawle, 464, it is declared, that although arrest and confinement on a *capias ad satisfaciendum*, are not a satisfaction of the debt, yet, if the plaintiff consents to the discharge, "then, indeed, the debt is gone." So, on the discharge of Carter, by the plaintiff's order, we are of opinion, the debt was gone, and therefore, Leshar was no longer liable. The judgment of the Court of Common Pleas in this case must be affirmed.

Judgment affirmed.

Cited by Counsel, 9 W. 400; 1 W. & S. 380; 18 S. 390.

[PHILADELPHIA, JANUARY, 1830.]

Heisse against Markland, Surviving Executor of Heisse.

CASE STATED.

Testator bequeathed to his sons-in-law, J. and R., twenty thousand dollars, in trust, to place the same out at interest, and to apply the interest to the support and education of all the children of his son, H., born, and to be born, during their respective minorities; and to divide and pay the principal in equal parts and shares to the said children, when, and as they severally and respectively arrived at the age of twenty-one years. At the time of testator's death, his son, H., had five children, and afterwards, at the time the eldest child attained the age of twenty-one years, had five more; at which time the whole ten were living; and it was agreed he might have more. Held, that the principal of the legacy was to be divided among those children who were living at the time appointed by the testator for its distribution, in exclusion of those who might be born afterwards.

CASE stated for the opinion of this court.

Frederick Heisse, by his last will and testament, dated January 3d, 1816, among other provisions, directed as follows, viz. :

"*Item*, I give and bequeath to my sons-in-law, John Markland and Robert Morrel, the sum of twenty thousand dollars, in trust, nevertheless, to place out, and continue the same from time to time, at interest, on good landed security, or invest the same in bank or other stock, and receive the interest thereof, [*275] and apply the *same for the support and education of all the children of my son, Henry, born, and to be born, during their respective minorities, as they, the said trustees, shall think proper, and most beneficial, and to divide and pay the principal in equal parts and shares to the said children, when, and as they severally and respectively arrive at the age of twenty-one years."

The testator died in 1817, at which time his said son, Henry, had five children, viz. :

Aurora Eliza, born July 27th, 1808. Catharine Sheffield, born March 29th, 1810. Dezia Morrel, born March 29th, 1812. Frederick Earll, born March 17th, 1814. Minerva, born September 15th, 1816.

And he has had five born since, viz. :

Cynthia, born March 16th, 1818. Anne, born June 25th, 1821. John Markland, born November 8th, 1822. Edwin, born November 12th, 1824. Maurice, born August 18th, 1828. Making in all ten children, who are all living. It is agreed that he may have more.

[Heisse v. Markland, Surviving Executor of Heisse.]

Aurora Eliza, the plaintiff, arrived at the age of twenty-one on the 27th of July, 1829. She claims in this suit two thousand dollars, as being one-tenth of the said twenty thousand dollars, with interest on the same from the time of her coming of age.

Upon these facts, if the opinion of the court shall be in favour of the plaintiff, the court will pronounce judgment accordingly, and specify the amount; if the opinion of the court shall be in favour of the defendant, leave reserved to enter a nonsuit.

Wheeler, for the plaintiff.

Lowber, for the defendant.

The opinion of the court was delivered by

GIBSON, C. J.—In *Ellison v. Airey*, 1 Ves. 111, it was held, that where a legacy is to be distributed among a number, not named, but described in general terms, all who answer the description at the appointed time of distribution, shall take in exclusion of those who may happen to answer it afterwards. Accordingly, it has since been determined in a train of cases,* not authority here, it is true, but nevertheless founded in reason and necessity, that in case of a bequest to the children of a person named, as they respectively attain the age of twenty-one, none shall take who was not born at the period prescribed for distribution. And it is certain, that slight indications of an intent to the contrary, such as the words “born, or to be born,” will be insufficient to found an exception. To prevent an indisputable violation of the intention on the one hand, these words must, on the other, be taken to have been used in reference to the period of distribution; by which means each part of *the [*276] testator’s direction may be made consistent with the whole. If this were not the rule, restitution by those who had received their legacies would be necessary, from time to time, as other children should happen to be born, or distribution would have to be deferred, in violation of the testator’s clear and positive direction, till all possibility of further procreation should be extinct; in either way, a measure extremely inconvenient, if not impracticable. Doubtless, there may be cases where the persons to take shall be determined subsequently to the time of distribution, as where it is evident that the circumstance of the time was a subordinate consideration; for it is certain, that a particular and minor intent must not be permitted to frustrate general and ulterior objects of paramount consideration. But

* See particularly *Whitbread v. St. John*, 10 Ves. 152, and *Gilbert v. Borman* 11 Ves. 238.

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where there are no ulterior objects, such as a bequest over, depending on the death of all the children, the time of distribution is, itself, a circumstance of paramount consideration: consequently, the plaintiff here is entitled in proportion to the number born when she came of age.

Judgment for the plaintiff.

Cited by Counsel, 3 Wh. 301.

[PHILADELPHIA, JANUARY, 1830.]

Scheerer *against* Stanley.

IN ERROR.

A purchaser at sheriff's sale is entitled to receive rent from the person in possession only from the time the sheriff's deed is acknowledged.

WRIT of error to the Court of Common Pleas of *Philadelphia* county, in which a case was stated for the opinion of the court, with liberty to turn the same into a special verdict.

Jesse Stanley, the defendant, has been in the possession of a house and lot in the city of Philadelphia, since the year 1826, as tenant, from year to year, at a rent of two hundred and twenty-five dollars per annum, payable quarterly, on the 20th days of February, May, August, and November. He came into possession of the property as the tenant of the widow Cumpston, to whom the same belonged.

By virtue of a writ of *venditioni exponas*, issued to September Term, 1828, on a judgment obtained in the District Court, against Mrs. Cumpston, the house and lot aforesaid were, on the 23d of June, 1828, exposed to public sale by the sheriff, and struck off to Sheerer, the plaintiff, at the price of three thousand three hundred and fifty dollars. The terms of sale were cash in ten days.

On the 3d of July, 1828, the purchaser, Scheerer, paid one thousand three hundred and fifty dollars to the sheriff. There was a mortgage on the property for two thousand six hundred [*277] dollars, *held by Charles Francis, and a negotiation was entered into between Scheerer and the mortgagee to suffer the mortgage to remain a charge on the property; but on the 3d of September, 1828, the sheriff refused to give his sanction to any arrangement which Sheerer and the mortgagee might make, and on the same day, Scheerer paid the balance, two thousand dollars, to the sheriff, with interest on the same from the 3d of July, 1828.

[*Scheerer v. Stanley.*]

The writ was returnable on the first Monday, 6th of September, 1828. On that day it was returned, and the sheriff's deed to Scheerer was duly acknowledged, and dated on the same day.

On the 20th of August, 1828, a quarter's rent, amounting to fifty-six dollars and twenty-five cents, became due, which was demanded of Stanley by Mrs. Cumpston, and paid by him to her. Previous to this, to wit: on the 24th of June, 1828, Scheerer had given notice to Stanley, that he, Scheerer, had become the purchaser of the property at sheriff's sale, and claimed a proportion of the rent, to be calculated from the 23d of June, 1828.

The question for the opinion of the court is, whether the plaintiff be entitled to recover from the defendant the whole, or any, and what part of the quarter's rent which became due on the 20th of August, 1828.

If the opinion of the court should be in favour of the plaintiff, judgment to be entered for him accordingly, for such sum as the court shall direct; if the opinion of the court should be in favour of the defendant, judgment to be entered for him. The costs to abide the event of the suit, as if the cause had been tried in the ordinary way.

The Court of Common Pleas gave judgment for the defendant.

Specification of Errors:—

"1. The court erred in giving judgment for the defendant. The judgment ought to have been for the plaintiff, for the whole of the quarter's rent, which became due the 20th of August, 1828.

"2. If judgment ought not to have been entered for the plaintiff of the whole of the quarter's rent, then judgment ought to have been rendered for him for such proportion of it as became due from the day of sale till the 20th of August, 1828."

T. S. Smith, for the plaintiff in error, observed, that the purchaser at sheriff's sale became the landlord from the day of sale, the deed having a retrospective operation. In contemplation of law, he pays the money at that time, and is, therefore, entitled to rent by way of compensation for the loss of interest on the purchase-money. In *Hawk v. Stouch*, 5 Serg. & Rawle, 157, it was decided, that a purchaser at sheriff's sale, cannot give notice to the person in possession, so as to ground a proceeding, under the act of assembly of the 6th of April, 1802, before the acknowledgment of the sheriff's deed; yet, the judge who delivered the opinion of the *court, distinctly says, that after acknowledgment, the rights of the purchaser re- [*278] late back to the time of sale.

[Scheerer v. Stanley.]

W. M. Meredith, for the defendant in error, answered, that the general principle was clearly in favour of his client. Here the purchaser had not paid his money at the day the property was struck off to him ; and, consequently, the ground upon which he puts his claim fails. The notice he gave was, that he should claim a proportional part of the rent accruing after the day of sale, instead of which, he now claims the whole quarter's rent. In *Hawk v. Stouch*, 5 Serg. & Rawle, 157, the case referred to on the opposite side, the term sale, was held to mean the completion of the sale, by the acknowledgment of the sheriff's deed.

The opinion of the court was delivered by

GIBSON, C. J.—On receiving the sheriff's deed, the title of the purchaser may, for some purposes, be referred to what is popularly called the sale ; and there is a *dictum* to that effect in the opinion of the court in *Hawk v. Stouch*, 5 Serg. & Rawle, 157. It was, however, ruled in that case, that he cannot previously give notice to quit, for the purpose of founding a proceeding to recover the possession ; and it seems as clear, that he cannot give notice of his purchase to entitle himself to the rent. It is expressly declared, that he shall be substituted for the landlord, only when he shall have received the deed ; and this declaration must have been intended to qualify the subsequent clauses, as it would be incongruous to entitle him to rent which accrued before the relation of landlord and tenant was established. In designating the period from which he is to be entitled, the framers of the law undoubtedly use the words, "subsequent to such sale." But the contract with the sheriff, being imperfect before it has had the sanction of the court, is in law, and in fact, no sale at all. If the purchaser were entitled to rent due before the acknowledgment of the deed, he would necessarily be allowed to warn the tenant to retain it in the meantime : yet, the legislature seems not to have contemplated notice of a doubtful right, or one depending on a contingency. It would seem, therefore, that the title of the purchaser is but co-extensive with his character of landlord, which is expressly limited to commence at the acknowledgment of the deed.

Judgment affirmed.

Cited by Counsel, 4 Wh. 222 ; 10 W. 14, 364 ; 1 W. & S. 524 ; 7 H. 127 ; 9 C. 96 ; 24 S. 341.

Cited by the Court, 3 W. 403 ; 5 Barr, 14 ; 7 Wr. 349 ; 1 S. 265.

*[PHILADELPHIA, JANUARY, 1830.]

[*279]

Enters *against* Peres and Another, Executors of Peres.

IN ERROR.

In an action on a bond, accompanied by a mortgage, a subsequent mortgagee is a competent witness for the defendant.

Aliter, where suit is brought upon the mortgage.

IN the District Court for the city and county of *Philadelphia*, from which the record of this case was returned on a writ of error, the defendants in error, who were plaintiffs below, brought an action on a bond, given to their testator by Lewis Enters, the plaintiff in error, dated the 8th of October, 1813, conditioned for the payment of two thousand two hundred and sixty-six dollars and sixty-seven cents. The plaintiffs also gave in evidence a mortgage, bearing the same date as the bond, and given to secure its payment.

The defendant called, as a witness, Andrew Busch, who having been sworn on his *voir dire*, at the request of the plaintiffs' counsel, declared as follows:—"I hold a bond and mortgage of Lewis Enters, on the same property, which is covered by the mortgage of the plaintiffs' testator. Mine is the younger and unsatisfied. It is for two thousand four hundred dollars. There are three hundred dollars interest on it. I think the property mortgaged worth between five and six thousand dollars."

The plaintiffs' counsel objected to the admission of the witness, and the court sustained the objection.

The objection of the witness was now assigned for error by *S. Levy*, who contended, that the witness had no fixed interest in the result of the suit. His evidence did not go to enlarge or create a fund, out of which he was to be paid, except in the event of contingencies, which the court would not regard. He cited, 1 Phill. Ev. 38; *Miles v. O'Hara*, 1 Serg. & Rawle, 36; *Hayes v. Grier*, 4 Binn. 83; *Phoenix v. The Assignees of Ingraham*, 5 Johns. Rep. 427.

Stroud, contra, referred to 1 Phill. Ev. 52; 1 Caines's Rep. 364; 13 Mass. Rep. 391; *Youst v. Martin*, 3 Serg. & Rawle, 427; 2 Dall. 51.

PER CURIAM.—Had the suit been on the mortgage, the witness and the plaintiff having concurrent interests in the land, would have had direct and conflicting interests in the event of

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the contest, which would have rendered the former incompetent. The action is, however, on the bond, and although the mortgaged premises may possibly be levied under the judgment, that is by no means a necessary consequence, the personal estate of the [*280] defendant being equally *liable; so that the interest of the witness depending on the contingency of the fund for payment of his debt, being taken away by a superior lien, affected his credibility, but not his competency.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 2 Wh. 154; 4 W. & S. 486; 3 W. 118; 2 Barr, 59.

[PHILADELPHIA, JANUARY, 1830.]

Shaw *against* Wile.

IN ERROR.

Where the injury complained of is a continuing one, and such continuance is the ground of a new action, it is error to lay in the declaration affirmatively, that any part of the injury accrued after the commencement of the suit.

But where the only act which is actionable, has passed before the writ issued, and the consequences of it, though continuing, are not the ground of a new action, it seems, the law is otherwise.

But if it be not, and the time is laid under a *videlicet*, or is insensible, or impossible, the error is cured by verdict.

THIS case came before the court on a writ of error to the District Court for the city and county of *Philadelphia*. In the court below it was an action brought by Conrad Wile, the defendant in error, against the plaintiff in error, Joseph Shaw, for debauching the plaintiff's daughter, and getting her with child, *per quod servitium amisit*.

The suit was instituted on the 8th of May, 1823, and the declaration, which was filed on the 11th of August, 1823, set forth, that the defendant "heretofore, to wit: on the 6th day of August, A. D. 1822, and on divers other days and times, between that day and the day of exhibiting this bill, at the city aforesaid, debauched and carnally knew the said Maria Wile, then, and there, and from thence for a long space of time, to wit: hitherto, being the daughter and servant of the said Conrad Wile, whereby the said Maria Wile became pregnant and sick with child, and so remained and continued for a long space of time, to wit: for the space of nine months, then next following, at the expiration whereof, to wit: on the 6th day of May, in the year 1823, at the city aforesaid, she, the said Maria, was

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delivered of the child with which she was so pregnant, as aforesaid to wit : at the city aforesaid, by means of which said several premises, she, the said Maria Wile, for a long space of time, from the day and year first above mentioned, hitherto became, and was unable to do, or perform the necessary offices and business of the said Conrad Wile, so being her father and master, as aforesaid, &c. And also, by means of the said several premises, he, the said Conrad, was forced and obliged to, and did necessarily, pay, lay out, and expend, divers sums of money, in the whole, amounting to a large sum of money, to wit : the sum of two hundred dollars, *in and about the nursing and [*281] taking care of the said Maria Wile, his said daughter and servant, and in and about the delivering of the said child, to wit : at the city aforesaid," &c.

The jury found a verdict for five thousand five hundred dollars damages ; upon which, the defendant sued out a writ of error.

The error assigned, and relied upon in this court was, that the cause of action, or some part of it, is laid to have accrued since the inception of the suit.

P. A. Browne, for the plaintiff in error.

Dallas and Keemle, for the defendant in error, referred to *Crouse v. Miller*, 10 Serg. & Rawle, 155 ; *Sauerman v. Weckerly*, 17 Serg. & Rawle, 117 ; *Schlosser v. Brown*, 17 Serg. & Rawle, 250 ; *Geary v. Cunningham*, 17 Serg. & Rawle, 424 ; 1 Tid. Pr. 77, 78.

The opinion of the court was delivered by

HUSTON, J.—It was contended here, that from the narr. in this case, it was apparent, that the jury gave damages for a period of time subsequent to the commencement of the action ; or, that from what is contained in the narr. and pleas, they may have done so, and that this is error, for which this court must reverse.

I admit, that generally, in stating the damages, care must be taken that no part of them appear to have accrued after the commencement of the action ; and that if it is laid affirmatively, that they did accrue after the commencement of the suit, it has been held to be error. I do not admit, however, that expressions in a declaration which will admit of such a construction, will, in all cases, be error. Where the injury is a continuing one, and such continuance is the ground of a new action, there is some reason in the law ; but where the act, and the only one which is actionable, has passed before the writ issued, but the

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consequences, though continuing during the life of the plaintiff, are not the ground of a new action, it is perhaps otherwise. Damages in the shape of interest, are given in debt and *assumpsit*, up to the time of the verdict; and in assault and battery, and mayhem, the eye, or the member destroyed, can never be restored, and the jury consider this, because no new action can be brought for it. It is not necessary, however, to give an opinion on this point, because there are other grounds on which the court think this narr. must be supported. I do not enter into the question, whether, "up to the day of exhibiting this bill," relates in England to the bill of Middlesex, a writ to the sheriff, to bring the defendant into court, or the narr., called a bill; nor, whether, as the narr. ought to be filed there, of the first term, it is not to be considered as filed then, in order to support a judgment, though in fact, it was filed afterwards. The gentleman who drew this declaration, has admitted the phrase is incorrect in a declaration in this state. It is settled, long [*282] since, *that this error is cured by a verdict, if the time is laid under a *videlicet*. 2 Saund. 169, 171, note; Webb v. Turner, 2 Stra. 1095. It is so laid in this case. So, if the time laid is insensible, or impossible; for it was supposed the court instructed the jury at what point damages were to stop. The words, "for a long space of time, from the day and year first above mentioned, hitherto, became, and was," &c., have also been objected to. The answer to this is, the precedents are so. See 2 Chitty's Pl. 307, 308.

Judgment affirmed.

Cited by Counsel, 2 Wh. 347.

[PHILADELPHIA, JANUARY, 1830.]

Howell *against* Alkyn.

APPEAL.

If goods levied upon by the sheriff under a *feri facias*, be left in the defendant's possession, with the plaintiff's permission, and before a sale, a second execution be levied upon them, the lien of the first execution is not lost, unless there be fraud, which may be inferred from circumstances.

THIS case came before the court on an appeal from the decision of the District Court for the city and county of Philadelphia, under the act of assembly of the 16th of April, 1827, "relative to the distribution of money arising from sheriffs' and coroners' sales," &c.

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A case was stated for the opinion of the District Court, from which it appeared, that Howell obtained a judgment in that court against Alkyn on the 15th of September, 1826, for one thousand three hundred and seventy-two dollars. On the 20th of the same month, he issued a *fieri facias*, returnable to the following December Term. On the 26th of September, 1826, a levy was made by sheriff Douglass on goods, but of what description, the case did not state. On the next day, the plaintiff ordered the sheriff to suffer the goods to remain in the defendant's possession, at the plaintiff's risk. On the 9th of December, 1826, the plaintiff gave the sheriff orders to sell, and on the 16th of that month, the goods were sold by sheriff Douglass. On the same day, but previous to the sale, notice was given to him of the claim of Messrs. Earp, for the use of Wardell, who had, on the 6th of November, 1826, obtained a judgment in the same court against Alkyn, for two hundred and eighty-nine dollars and sixty-seven cents, on which they issued an execution on the 6th of December, 1826, and put it into the hands of sheriff Strembeck, the successor of Mr. Douglass, with instructions to levy immediately. Under this writ a levy was made on the 9th of December, 1826, on the property which had been levied upon under Howell's execution, but all knowledge of the first levy was denied by the plaintiffs in the second execution. Sheriff Strembeck *returned, that the prop- [*283] erty levied on by him had been levied on, and was claimed by sheriff Douglass.

The proceeds of sale, which were insufficient to satisfy both executions, were paid into court, under a rule, obtained by the second execution creditor. Both execution creditors obtained rules to show cause why they should not take out of court, the amount of their respective debts. The District Court awarded the money to the first execution creditor, directing, however, that it should remain in court, to abide the appeal entered by the second execution creditor.

Toland, for the appellant, admitted, that according to some early decisions of this court, a plaintiff who permitted goods which had been levied upon to remain in the possession of the defendant, did not lose his lien upon them; but observed, that these decisions grew out of the peculiar situation of the country at that time, and were confined to household furniture. The inconvenience resulting from such a practice, had latterly induced, even on the part of our state courts, a closer adherence to the common law, which treated such conduct as fraudulent; and the Circuit Court of the United States for the Pennsylvania district, had always conformed to the settled law of England. The order,

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to leave the goods in the hands of the defendant, which was equivalent to an order to stay the proceedings, rescinded the levy. He cited, 2 Tid. Pr. 919; *The United States v. Conyngnam*, 4 Dall. 358; *Clow v. Woods*, 5 Serg. & Rawle, 275; *Cowden v. Brady*, 8 Serg. & Rawle, 505; *Babb v. Clemson*, 10 Serg. & Rawle, 419; *Hunt v. Breeding*, 12 Serg. & Rawle, 37; *Dean v. Patton*, 13 Serg. & Rawle, 341; *Hower v. Geesaman*, 17 Serg. & Rawle, 251; *Barnes v. Billington*, 1 Wash. C. C. Rep. 29; *Berry v. Smith*, 3 Wash. C. C. Rep. 60.

Page, for the appellee, was stopped by the court, whose opinion was delivered by

HUSTON, J.—The material facts are as follows:—On the 20th of September, 1826, Howell put into the hands of the sheriff a *feri facias*, returnable the 4th of December, 1826. On the 21st of September, 1826, the sheriff made a levy, by going to the house and seizing part of the personal property in the name of the whole. Next day, a schedule of all the personal property was given to him, and annexed to the writ. No person was left to take charge of the goods. The plaintiff told the sheriff to let the goods remain in the defendant's hands at my (the plaintiff's) risk. On the 9th of December, 1826, the plaintiff gave the sheriff orders to sell. On the 16th of December, 1826, the goods were sold. But in the meantime, another plaintiff had obtained a judgment, and on the 6th of December, 1826, issued an execution, which was put into the hands of the sheriff, with directions to levy and sell immediately. A new sheriff had come into office since the former levy. On the 9th of December, [*284] 1826, this second execution was levied. The sheriff did not know of the former levy at that time, but in the evening, when he went to put a man in the house, he found one there by the former sheriff. The second levy, as indorsed, mentions the former levy, and that the property is claimed by it. The sale was under both executions, and the question is, to whom the money belongs. The District Court awarded it to the first execution.

I do not refer particularly to this case, nor mean to censure the gentleman who argued this cause, but say, that the constant recurrence in matters of long and every day practice, and of frequent decision, to the practice of other countries; and the censure more than implied, that our practice, where it differs from that of England, must be wrong, is to me, rather painful.

The usages of every nation is founded on what is most convenient and useful to themselves; unless where they admit they are incapable of thinking and acting for themselves.

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At the first settlement of this country, and in many parts of it yet, money is scarce, and more so at some seasons of the year than at others; personal property consisted of necessary articles of household furniture, necessary implements of a trade, or husbandry, and the necessary horses and cattle on the farm; each had as much of this property as was absolutely necessary, and few wanted more, or if they did want it, very few were able to purchase it, and pay cash for it. If sold on execution, it was almost ruin to the debtor, and produced small relief to the creditor, for it sold almost for nothing: often, if advertised, no bidder attended. The fear of ruin from a sale, made the defendant use every exertion; harvest came, and he thrashed and sold his crop, or he sold lumber, or he borrowed, or in all these ways he paid the debt. This was better for both parties; and from a state of things, of which this is not a highly coloured picture, grew the usage of not proceeding to a sale at once, when an execution was put into the hands of the sheriff or constable. Necessity, in the first instance, and mutual benefit, began and matured it.

I deny the assertion of Judge Washington, that if the plaintiff directs the sheriff to delay the sale, one day avoids his levy as much as a year. Literally, and in all cases, he did not mean that; his meaning must have been, that if the levy is designed as a fraud and cover, it is void at once, and from the instant it is made.

There are expressions that go to show, that the indulgence given in this country, is peculiar to household furniture. This doctrine is only known in cities, and is not long known any where. *Levy v. Wallis*, 4 Dall. 167, was stock on a farm; and the implements of husbandry, and tools of a tradesman, are as often left for a considerable space after levy, as any other kind of property; so, horses and cattle, because, to remove and keep them, is expensive. Store goods, or articles which the defendant keeps expressly for sale, will probably be sold if left; such may be bound by stricter rules.

*Property was not moved from the possession of the defendant, because it increased expense, and increased [*285] hardship, without any benefit; nay, to the injury of the creditor. If the horses or the ploughs were taken from the defendant, the crop, which would pay the plaintiff, could not be raised. There was no risk in leaving them with the defendant; it was, and it is, unknown in the country, that a man, having a family, shall run away and leave them because of debt, or secrete property, to the injury of a sheriff who has levied on it, and trusted to his honesty, that it will be found at the day of sale. Add to this, that in more than half the cases in which executions are levied

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on personal property, the money is paid without a sale. I speak of the country, but suspect the case is nearly the same in the city. On this state of things, who will say, the delay of a few days to sell, is fraudulent or unlawful, or in any way objectionable? None but those who do not know the situation and course of business immediately around them, or who cannot think or feel.

In this case there is no fraud stated, and nothing from which to infer it. The declaration, that the goods might be safely left in the defendant's hands, till sold, has no effect; nor has any other declaration, or act of the plaintiff, if it does not go to prove, that the levy was made to cover the goods for the defendant. Mere expressions of compassion, of friendship, or of kindness, or of confidence, do not destroy or affect the plaintiff's rights; nor will an express order to delay the sale for a few days, within which the defendant expects to get the money, or within which he can haul in his crop, or till one of his family is off the bed of sickness, destroy, or even affect his rights.

In Doty v. Turner, 8 Johns. Rep. 16, the execution was delivered on the 2d of June. The instructions of the attorney were, that the plaintiff did not wish to distress the defendant, but wished a levy made to secure his debt: That if the property was suffered to remain in the hands of the defendant, the sheriff would not be considered liable in case the property was squandered. The levy was made and nothing more done, nor any other instructions given, until after the return of the execution, nor till after the receipt of another *feri facias*, at the suit of another plaintiff, which was levied on the same property. The property was sold, and the sheriff returned these facts specially. The defendant was father-in-law of the plaintiff in the first execution. The plaintiff in the first execution sued the sheriff, and the court decided, that he was entitled to the money. There was no agreement between the plaintiff and the defendant, that the execution should sleep in the sheriff's hands. If a long time had elapsed between the first and second execution, it might have been left to the jury as a presumption of fraud. Fraud is the only ground on which a delay to sell can be impeached. Whipple v. Foot, 2 Johns. Rep. 418.

In 11 Johns. Rep. 110, the execution was levied, and the sheriff *directed not to sell. This was in June, 1807. [*286] In May, 1808, another execution came into the sheriff's hands. In August, 1808, the plaintiff in the first execution told the sheriff not to sell, unless pressed by younger executions. In September, the property was sold, and the money awarded to the second execution. But here there were express directions by the first plaintiff not to sell. In 17 Johns. Rep. 274, a *feri*

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facias was delivered on the 13th of October, 1817, with directions to make a levy on the property of the defendant, but to do nothing until ordered, unless crowded by younger executions, but by no means to let the execution lose its preference. On the 5th of May, 1818, another execution come to the hands of the sheriff, returnable the 16th of May. On the 6th of July, 1818, the sheriff sold, and the proceeds were awarded to the second execution. The court say, according to the decisions of that court, which have followed the English decisions, the first execution is to be considered as dormant, and constructively fraudulent. The evidence warrants the inference, that the first execution was not issued to collect the debt, but partly, at least, to cover the defendant's property for his use. And they add, the sheriff has no discretionary power in this respect; the law determines the preference. This last, taken in its full extent, I deny.

As to the law and practice in England, in respect to expedition in cases of levy, I suspect it is not precisely what some suppose. It is so different from our practice, that I do not know what it is. The sheriff makes a bill of sale to the plaintiff, say all the books. What course is then pursued I know not, and I care not. The law once was, that if the sheriff had executed his writ before the return day, he was safe, and it is so yet in this country. If, after levy, the property is lost or wasted, he is liable; if found at the day of sale, he is not liable. As to what length of time may elapse after a levy, and before a sale, I know of no fixed rule. If, from the declarations of the plaintiff, it is apparent the levy is made not to collect the money, but to protect the goods of the defendant from other creditors, it is, as to those others, fraudulent. This may be inferred from circumstances, or in some cases, from great length of time; and where fraud is found, the levy loses its preference. The circumstances of the case, the prospect of a sale if attempted, or of payment without a sale; circumstances of distress in a defendant's family, (for humanity is not contrary to law in this state,) may all be considered. It has never been held, that the plaintiff saying, he did not wish the defendant distressed; or, that the defendant was honest, and would not secrete his goods, and that the sheriff might levy on them, and safely leave them in the defendant's custody; nor saying to the sheriff, you must have my money at the return day of the writ, but I do not object to any indulgence you can give the defendant in the mean time; or saying, levy and get my money, but you need not move the horses and wagon, or sell them, till the man has hauled in his crop, which is ready, or nearly ready; *or saying, levy on all, but do not sell till his wife is recov-

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ered from her illness, is fraud, or ought alone to be considered as evidence of fraud.

Judgment affirmed.

Cited by Counsel, 3 Penn. R. 490; 5 R. 289; 5 Wh. 152; 3 W. & S. 287; 7 W. & S. 66; 8 W. & S. 457; 5 Wright, 275.

Commented on, and explained, in 4 R. 380.

Cited by the Court, 7 W. 77; 1 H. 412.

Cited by Lower Court, 11 N. 275.

[PHILADELPHIA, JANUARY, 1830.]

App and Another, Executors of App, *against* Dreisbach.

IN ERROR.

A decree of the Orphans' Court, confirming the settlement of an administration account, is conclusive, as to the items set out in it, and directly acted upon by the court.

If there be two executors, an action for a legacy must be against both; but if one has nothing in his hands, he may separately plead, *plene administraverunt*, and if it be found for him, judgment will be rendered in his favour.

The third section of the act of the 21st of March, 1772, directing the court in which an action is brought for a legacy, to appoint auditors, on the plea of want of assets, does not authorize the auditors, in an action of *assumpsit*, to ascertain the amount of a residuary legacy. The legatee must compel the executor to a settlement in the Orphans' Court, and thus ascertain the amount, or bring an action of account render, in which a statement of all the assets will be exhibited.

It seems, that where an executor has settled his account, exhibiting a balance in his hands, he ceases to be a trustee, and becomes a debtor for such balance, to the legatees; and is therefore, protected by the act of limitations.

Still less can an executor be considered a trustee, not protected by the act of limitations, in respect of a sum of money, charged to be due from him, which, at the time of the settlement of his account, and ever afterwards, he denied to be due.

Notice given, agreeably to the rules of court, or by the directions of an act of assembly, is as effective and binding, as actual notice.

ON the return of a writ of error, by which the record of this case was removed from the Court of Common Pleas of *Northampton* county, it appeared, that Henry Dreisbach, the defendant in error, brought an action of *assumpsit* against Frederick App and Ludwig Kleppinger, executors of Michael App, deceased, for the share alleged to be due to him as one of the residuary legatees of the said Michael App.

The declaration contained two counts, the first of which, set forth in substance, that the said Michael App, on the 25th of March, 1808, made his will; by which, among other things, he

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directed, that the whole of the residue of his estate should be sold by his executors, and as equally as possible, divided among his four children, Frederick App, Mathias App, Leonard Hisley, and Henry Dreisbach: That he appointed the defendants his executors, who proved the will, and that the sum of seven hundred and nine dollars and sixty-three cents, beyond all debts, funeral expenses, and specific *legacies, came into the hands of the executors, of which they became liable to pay [*288] to the plaintiff, one hundred and seventy-seven dollars and forty cents, one-fourth part thereof, which they promised to pay.

The second count was for one hundred and seventy-seven dollars and forty cents, money had and received by the defendants, for the use of the plaintiff.

The defendants pleaded *non assumpserunt, non assumpserunt infra sex annos*, and payment with leave, &c. The plaintiff took issue on the first plea, and to the last, replied *non solverunt* and issue. To the second he replied, "that the sum demanded is for a share of the residue of the estate of Michael App, deceased, bequeathed to the plaintiff, by the last will and testament of the said Michael App, and the money received in trust, and wrongfully withheld from the plaintiff." The defendants rejoined, that no such moneys were received or withheld by them, and issue.

The will of Michael App, so far as it is material, was in these words:—

"I have sold to my son, Frederick App, a piece of land, situate in Lehigh township, Northampton county, as per agreement made, executed the 18th of November, in the year 1780, for the sum of three hundred pounds; one hundred pounds have been paid to me by my son. The other two hundred pounds shall be settled with him after my decease, on account of his portion.

"It is my will, that my son-in-law, Leonard Hisley, shall receive fifty pounds, in advance, because he has not received from me as much as the other children have; and these fifty pounds shall be paid by my hereinafter-named executors, to him the said Leonard Hisley, his heirs, or attorney, as soon as sufficient money is in their hands.

"It is further my will, that all the rest of my property shall be sold by my executors, and, as much as possible, equally divided among my four children, Frederick App, Michael App, Leonard Hisley, and Henry Dreisbach."

The plaintiff, having proved the execution of the article of agreement of the 18th of November, 1780, referred to in the will, offered the same in evidence; to which the defendant's counsel objected, on the ground, that it was irrelevant, and not

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material to the issues trying. The court, however, overruled the objection, and permitted the instrument to be read in evidence. The defendant's counsel thereupon tendered a bill of exceptions.

An exemplification of an account, settled by Frederick App, one of the executors of Michael App, deceased, before the register of Northampton county, on the 8th of May, 1813, having also been offered in evidence by the plaintiff, was objected to by the defendant's counsel, but admitted by the court, who sealed a second bill of exceptions.

The defendants then gave in evidence three receipts, given by [*289] *Henry Dreisbach to Frederick App, one of the defendants, one of them dated the 13th of November, 1809, for ten pounds seven shillings and nine-pence; another, dated the 11th of November, 1815, for twenty-seven dollars and twenty-six cents; and the third, dated the 11th of November, 1815, for ten dollars; it being admitted, that the last mentioned receipt was for so much received in full for any moneys which might be recovered on the bond of Jacob Eyerly, mentioned in the administration account as a lost debt. They also gave in evidence two receipts, proved by the deposition of Mathias App, which, translated from the German, ran thus:—

“The 26th of August, 1803, I, Frederick App, have fully settled with my father, Michael App, all what was unsettled, (or outstanding,) what was unsettled I have received in full. So much from me.

“FREDERICK APP.

“Witness, { HENRY DREISBACH,
 { MATHIAS APP.”

“The 26th of August, 1803, I, Michael App, have fully settled with my son, Frederick App, all what was unsettled, (or outstanding,) what was unsettled I have received in full. So much from me.

“MICHAEL APP.

“Witness, { HENRY DREISBACH,
 { MATHIAS APP.”

The defendants then gave in evidence the record of the Orphans' Court of Northampton county, from which it appeared, that the account settled and filed in the register's office on the 8th of May, 1813, was duly confirmed by the Orphans' Court on the 20th of August, 1813. In this account the sum of two hundred pounds, due from Frederick App to Michael App, was mentioned, but it was not introduced into the inventory, nor charged to the executors.

For the purpose of rebutting the evidence adduced by the de-

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endants, the plaintiff examined Robert Stewart, who testified that about the year 1802, he, at the request of Michael App, the testator, called on Frederick App, one of the defendants, and asked him why he did not pay the old man, his father, his dowry, according to the agreement entered into between them: That Frederick replied, "he would not: That his father and brother, Mathias, had cheated him; he had lent his father one hundred pounds in good money, and they had made it all out of one load of rye meal, and paid him in continental money: That he could not pay the dower any further; for if he did, this good for nothing Philip Scholl would get it, and it would be of no use to the old people, or to any of them." The witness then stated to Frederick App that he had seen an instrument by which he, Frederick App, was bound to pay the dower, and he ought to do it. Frederick App said he would not. *The witness then told him the old man had offered him one-half [*290] to collect it; and if he, Frederick App, said again he would not, he, the witness, would see how he could get it. Frederick App then said, if the old man would forgive what was back, he would pay it from that time on. There were two or three years back, the witness thought. He told him, he expected the old man would agree to it. The witness added, that the old man did agree; he sent for his son, Mathias App, who came in from Selin's Grove, and the witness understood they settled. He further stated that it was twenty-one or twenty-two years since Henry Dreisbach moved away to the Genessee country, in the state of New York, where he had lived ever since.

The plaintiff also read in evidence the deposition of Mathias App, taken in this cause; and by consent, the court read the notes of Mathias App's evidence taken on the trial. The object of this evidence was, to show the nature of the transaction between the father and son; but as no part of it was returned with the record, it is impossible to state what it was.

The evidence being closed, the counsel for the plaintiff requested the court to charge the jury on the following points:—

"1. That the sum of two hundred pounds, directed by the testator in his will to be reckoned up, or to be accounted for by his son, Frederick App, after the testator's death, was not an advancement to the said Frederick App, in as much as the testator did not divest himself of all property in the same, in his lifetime, but made a disposition thereof by his will.

"2. That the circumstance of the testator having made Frederick App, (his debtor,) his executor, is not an extinguishment of the debt; the executor in such case being a trustee for the parties interested in the estate, and accountable in equity for the debt due by him.

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"3. That this suit having been brought for a share of the residue of the estate of the testator, bequeathed by the will, it was right and proper to join both the executors, they having both proved the will.

"4. That the plea of *non assumpsit infra sex annos*, cannot avail the defendants, they being considered as trustees for the next of kin, of whom the plaintiff is one, and the statute of limitations does not apply in cases of trusts.

"5. The court are requested further to charge the jury, that in a suit for a legacy, if the jury are satisfied that the executors have received assets sufficient to satisfy and pay all debts and legacies, the law will imply a promise on the part of the executors to pay, and it is not necessary to prove an express promise."

The defendant's counsel submitted to the court the following propositions, on which they requested the jury might be instructed :

"1. That unless it appears that Frederick App and Ludwig Kleppinger, have both actually received moneys of the estate, [*291] to a *share of which the plaintiff would be entitled under the will of Michael App, deceased, the plaintiff cannot maintain this action.

"2. That if the jury believe, the two hundred pounds, mentioned in the will, were intended by the testator as an advancement to Frederick App, no part of that sum can be recovered from the defendants.

"3. That if the plaintiff's wife has been advanced by the testator, the plaintiff must bring that advancement into account, as so much of her portion of the estate under the will.

"4. That the appointment by a testator, of his debtor, to be an executor, is at law a release of the debt; and if Frederick App were indebted to the testator in the alleged sum of two hundred pounds, he could only be held answerable for it in the settlement of his accounts in the Orphans' Court; and as he is not charged with it in his account, settled before the register, on the 8th of May, 1813, and confirmed in the Orphans' Court of this county, on the 20th day of August, A. D. 1813, he cannot be made answerable for it in this action."

Answers of the court to the points propounded by the plaintiff's counsel :—

"1. It appears, that on the 18th day of November, 1780, Michael App, the testator, and Frederick App, one of the executors, entered into a contract for the sale, by the former to the latter, of a tract of land, for the consideration of three hundred pounds, to be paid by Frederick App to Michael App; one hundred pounds of this consideration money, it seems conceded, were paid, and the article of agreement states, 'and the residue of

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two hundred pounds, he, Frederick App, is to account for after the decease of his said father, Michael App.'

"In the will of the testator, he says, 'I have sold to my son, Frederick App, a piece of land, lying in Lehigh township, Northampton county, as per agreement, made the 18th day of November, in the year 1780, for the sum of three hundred pounds. One hundred pounds were paid to me by my son, Frederick App; the other two hundred pounds shall be settled with him after my decease, on account of his portion.'

"The defendant alleges that these two hundred pounds were settled by him with the testator in 1803, at the time the receipts, proved by the deposition of Mathias App, were given; and, that Mathias App proves, that the alleged two hundred pounds were only an advancement.

"If the testator did intend this sum as an advancement to his son, and the son also so understood it, it must be so considered in the decision of the cause, and what was the understanding in relation to this, the jury will decide from the evidence. They are the proper judges of the facts. From the article of agreement, and the will, independent of the parol evidence, the inference is very strong, *that these two hundred pounds [*292] were considered as an advancement, and if the testator so declared it by his will, it was a good advancement in law.

"2. The naming a debtor executor, and his acceptance of the trust, do not extinguish the debt. He has always been held a trustee in Pennsylvania, as soon as he takes upon himself the execution of the will, to the amount of his debt. He has actually received so much money, and is accountable in his personal character, to those legally entitled to it, as the same hand is to receive that is to pay. There is no ceremony to be performed in paying the debt, and no mode of doing it, but by considering the money to be in his hands.

"3. The court admit, that the suit has been correctly brought against both the executors, but if both have not jointly received assets, they are not jointly liable, each being liable for his own acts; and in this case, there is no proof, that Ludwig Kleppinger ever received any part of the estate into his hands, or in any way made himself liable for any part of it.

"4. The plea of *non assumpsit infra sex annos*, does not apply to cases of legacy or trust.

"5. In suits for legacies, when the jury are satisfied, that the executors have received assets sufficient to pay and satisfy all debts and legacies, the law will imply a promise on the part of the executors; and no express promise is necessary to charge them, and of course, where they have not received such assets, no promise can be implied."

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Answers to the points propounded by the defendants' counsel :—

"1. Unless it appears, that Frederick App and Ludwig Kleppinger, have both actually received moneys of the estate, to a share of which the plaintiff would be entitled under the will of Michael App, deceased, the plaintiff cannot maintain this action.

"2. If the jury believe the two hundred pounds, mentioned in the will, were intended by the testator as an advancement to Frederick App, no part of that sum can be recovered from the defendants.

"3. If the plaintiff's wife was advanced, she and her husband would, in case Michael App had died intestate, be obliged to bring the amount so advanced, into account ; but they cannot be compelled to do so in this case, where there is a will disposing of all the property of the testator.

"4. The appointment by a testator of his debtor, to be an executor, is not a release of the debt, in Pennsylvania. In such case, the executor is considered a trustee, as explained in the second answer to the points propounded by the plaintiff's counsel. He is accountable for it in his personal character, by a civil action, or by a settlement of his account in the Orphans' Court. And although he is not charged with it in his account, [*293] settled before the register *on the 8th of May, 1813, and confirmed in the Orphans' Court of this county, on the 20th of August, 1813, he can be made responsible by a civil action, the opposite party showing a clear mistake ; such account is only *prima facie* evidence in favour of the executor settling such account, and is not conclusive. The opposite party may show errors on the face of the account, and the jury would have a right to investigate those errors. If Frederick App, were indebted to the testator in the alleged sum of two hundred pounds, he would be held personally answerable for it by an action in this court, or by a proceeding in the Orphans' Court in adjusting his accounts. Such settlement and confirmation would not defeat the present action. The court, at the same time, are decidedly of opinion, that Ludwig Kleppinger should not be charged with the whole, or any part of the two hundred pounds, if the jury believe he received no part of it."

The defendants' counsel excepted to the charge of the court, who sealed a bill of exceptions.

The jury found a verdict for the plaintiff for two hundred and forty-four dollars and thirty-one cents ; and a motion made for a new trial on behalf of the defendants having been overruled, a writ of error was taken out, and the following errors assigned in this court :—

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"1. That the court below erred in admitting in evidence the article of agreement, mentioned in the first bill of exceptions.

"2. That the court erred in admitting in evidence the copy of the administration account, as settled by Frederick App before the register, mentioned in the second bill of exceptions.

"3. That the court erred in charging the jury on the first point propounded by the plaintiff, and on the second point propounded by the defendants, and should have taken upon themselves to decide the legal effect of the language used in the article of agreement and will, and charged the jury, that the two hundred pounds therein mentioned, were to be considered as an advancement.

"4. That the court erred in charging the jury on the second point propounded by the plaintiff, and third point propounded by the defendants, in regard to the law, where a testator makes his debtor his executor, and in regard to the manner of the liability of such executor.

"5. That the court erred in charging the jury relative to the statute of limitations, and its effect, and operation in this case, and also in regard to the law of advancements as applicable to this case.

"6. That the court erred in charging the jury, that in suits for legacies, the suit is correctly brought against two executors, where only one is liable for the money, and that this suit is correctly brought; no evidence having been adduced, that Ludwig Kleppinger ever received any money, or was liable for any.

"7. That under the evidence in the cause, no such action as that *set forth in the plaintiff's declaration, was maintainable; no moneys having ever come to the defendants' [*294] hands, belonging to the estate of the deceased.

"8. That there was no issue formed by the plea of the statute of limitations, and the replication and rejoinder thereto; or, if so, it was an issue as to the actual receipt of money by the defendants, which the plaintiff did not support by proof.

"9. That the court below erred in not setting aside the verdict, and granting a new trial."

Brooke and J. M. Porter, for the plaintiffs in error:—

1. The article of agreement, mentioned in the first bill of exceptions, was improperly admitted in evidence. The first count of the declaration stated, that the two defendants possessed themselves of the real and personal estate of the testator, to the amount of seven hundred and nine dollars and sixty-three cents,

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and that that amount actually went into the hands of both of them, whereby they became liable, &c. The second was the usual count, for money had and received. The article of agreement did not support either of these counts, and was, therefore, irrelevant. The plaintiff must prove his cause of action, as laid in the count. Arch. C. P. 362. In this case, the proper remedy was, an action on the special contract. *Huntsecker v. Heiney*, 11 Serg. & Rawle, 250. In actions on the money counts, the proof must accord with the allegation. A bond cannot be treated as money, though a negotiable instrument may. *Morrison v. Berkey*, 7 Serg. & Rawle, 245. It must be proved, that the money came into the hands of the defendant, and, therefore, the action is not maintainable against one of two grantees of an annuity, who was a mere surety, and who had received no part of the consideration. 2 Stark. 106. In *Hantz v. Sealy*, 6 Binn. 409, the law applicable to this case is clearly laid down. The action cannot be supported without proof, that the money came into the defendants' hands.

There is another ground on which the agreement was not admissible in evidence. The action is a joint one against two defendants, and the agreement in no respect affected Kleppinger. Courts will not take cognizance of distinct and separate claims, and the liabilities of different persons in one suit, though they stand in the same relative situations; and, therefore, in an action *ex contractu*, against several, it must appear on the face of the proceedings, that their contract was joint, and that fact must also be proved on the trial. If too many persons be made defendants, it is a fatal objection. Chitty Pl. 31, 32, 33; 19 Johns. Rep. 109, 427. If persons be joined as defendants, where they should not be, advantage may be taken of the misjoinder on the trial, under the general issue. Arch. C. P. 78. Now, the article of agreement was not evidence to charge App, because it did not prove that money had come to his hands; and, it was not evidence to charge Kleppinger, not only [*295] *for that reason, but because he was not a party to it. The only mode in which a recovery could have been had upon the agreement, was by an action against App alone, under a declaration specially setting forth the facts. In *Jordan v. Cooper*, 3 Serg. & Rawle, 564; the court insisted on the necessity of a concordance between the *allegata* and *probata*, as being among the land marks of the law. Although this action is brought against the defendants nominally, as executors, the judgment is *de bonis propriis*.

2. The objection to the admission in evidence, of the copy of the administration account settled before the register, by Frederick App, depends in part upon the same principles. It

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was not evidence of a joint liability, Kleppinger not having joined in the settlement. But it was liable to further objection, because it was a mere copy of an account settled before the register, and not a decree of the Orphans' Court, and there was no evidence that it had been confirmed.

3. In leaving the construction of the agreement and will, to the jury, the court below was clearly wrong. *Welsh v. Duser*, 3 Binn. 337; *Moore v. Miller*, 4 Serg. & Rawle, 279; *Vincent v. The Lessee of Huff*, 8 Serg. & Rawle, 381; *Roth v. Miller*, 15 Serg. & Rawle, 100.

4. The court below erred in their answers to the second point of the plaintiff, and the fourth of the defendants, in regard to the law, where a testator makes his debtor his executor, and as to the manner in which the executor is liable. In Pennsylvania, the appointment by a testator, of his debtor to be his executor, is a release of the debt. This is shown to be the law, by the cases of *Hostetter v. Kauffman*, 11 Serg. & Rawle, 146, and *Griffith v. Chew*, 8 Serg. & Rawle, 32. It is true, that where there is a court of chancery, he may be made responsible there, but there only. He cannot be made to answer in an action at law. We have no Court of Chancery, but we have an Orphans' Court with chancery jurisdiction, and the remedy of the one, and the responsibility of the other, are in that tribunal, and so it should be. That court, sitting as a court of equity, may so mould its proceedings, as to do speedy and substantial justice between the parties, which cannot be attained in a civil action. Admitting, however, the liability of the executor to creditors, it by no means follows, that he is also liable to legatees. *Co. Litt.* 364, b. No. 209, (1.)

The settlement and confirmation of the administration account by the Orphans' Court, was conclusive. It is true, there are some decisions in this state, which go to establish a different doctrine, but the case of *M'Pherson v. Cunliffe*, 11 Serg. & Rawle, 422, in which the subject was fully considered, overrules them all. The principles which governed that case, are in perfect accordance with the established rule, that the judgment of a court of competent jurisdiction, directly on the point, is a plea in bar, or as evidence, conclusive upon the same matter directly in question, in another court. In the later cases, of *The President of the Orphans' Court of *Dauphin County*, for [*296] the use of *Groff v. Groff*, 14 Serg. & Rawle, 181, and *M'Fadden v. Geddis*, 17 Serg. & Rawle, 336, the doctrine has been fully confirmed by this court, and placed upon a basis not to be shaken; and it is no inconsiderable addition to its support, that it is the doctrine of the Circuit Court of this district. *Blount v. Darrach*, 4 Wash. C. C. Rep. 657. There is nothing unrea-

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sonable in making such a decree conclusive. The accounts are regularly advertised; the parties have an opportunity of contesting them; an appeal is open to the highest tribunal, and if the party complaining has neglected these opportunities of redress, the fault is his own. If another position, attempted to be supported on the opposite side be true, viz.: that the statute of limitations does not apply to a case of this nature, it is an additional reason why the decree should be conclusive; for if it be not, an account would be liable to be overruled at any subsequent period, where the means of showing its correctness have been lost.

5. In that part of the charge which related to the statute of limitations, the court below erred. The abstract principle, that the plea of *non assumpsit infra sex annos*, does not apply to cases of legacy or trust, was laid down as applicable to this case, the circumstances of which make it an exception to the rule. The will was proved on the 5th of May, 1809. On the 6th of May, 1813, the account was settled, which was notice to all interested. On the 11th of November, 1815, a receipt was given for the balance, and on the same day, a receipt for Eyerly's debt, which was supposed to be lost. This suit was brought on the 22d of March, 1823. 'Can it be said, that after the 11th of November, 1815, when the account was settled, and the balance paid, there was any holding in trust? By the settlement of his account, the executor declared, that he did not owe the estate the two hundred pounds in question, and from that time, his holding was adverse. If so, the statute does apply; but if it does not, still the court laid down the law too broadly. The old rule, that trusts are not within the statute of limitations, was adopted in England, at a period, when at law it was considered an unconscionable plea. It is now treated with much more indulgence, and the rule of the present day is, that though courts of equity are not within the words, they are within the spirit and meaning of the statute of limitations, or, in the language of the late Chief Justice Tilghman, in *Wallace v. Duffield*, 2 Serg. & Rawle, 527, "trusts are not strictly within the act of limitations; but equity has wisely adopted the principle of the act." But the plaintiff's replication showed no fact to take the case out of the statute. It contained no allegation of trust or fraud. The issue was upon the receipt, and withholding the money wrongfully, not fraudulently; and to such a case the statute applies. In *Durdon v. Gaskill*, 2 Yeates, 268, the issue was upon fraud and concealment.

6. The instruction to the jury, that the plaintiff could not be compelled to bring the amount advanced to his wife into account, as *there was a will disposing of all the property of the

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testator, was likewise erroneous. From the terms of the

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will, it is evident, the intention of the testator was, that all his children should be made equal, and for that reason, he gave Leonard Hisley fifty pounds in advance. He directs Frederick App to account for the two hundred pounds, as part of his portion, and then directs his remaining property to be divided among his children as equally as possible. If it was his intention, that all should be equal, the plaintiff cannot recover a full share without regard to what he has already received.

7. This is an action for a legacy, and the judgment is *de bonis propriis*. The plaintiff declares on the personal *assumpsit* of the executors. In an action *ex contractu*, against several, it must appear, and be proved, that the contract was joint, or the plaintiff must fail. *Rush v. Good*, 14 Serg. & Rawle, 226 ; 1 Chitty Pl. 31 ; 19 Johns. Rep. 109, 427 ; *Riddle v. Stevens*, 2 Serg. & Rawle, 537. It is true, that where executors are sued on a contract of the testator, all must be joined, and here is the distinction. In that case, if one executor has no assets, and pleads *plene administravit*, he is entitled to a verdict. But if this plaintiff succeeds, his execution goes *de bonis propriis*, and the consequence of the direction of the court, of which we complain, is, that a verdict and judgment *de bonis propriis*, have passed against Kleppinger, when it is conceded, that he never had any money in his hands, and when the evidence offered and admitted, to charge him, were an agreement, and an account, to neither of which he was a party.

8. This court has laid it down, as a general rule, that to refuse a new trial is not error. But in a case like this, where the finding is so contrary to well settled principles of law, it seems necessary for this court to assume a discretionary power, to do justice between the parties.

Scott, for the defendant in error :—

1. The only objection made at the trial to the admission of the article of agreement in evidence, was its irrelevancy to the issues trying. There were two issues. One of the pleas was *non assumpsit infra sex annos*, to which the plaintiff replied, by an allegation of trust in the defendants, who rejoined, that no moneys had been received, or were held by them in trust. The agreement was, therefore, proper evidence, under the issue thus created, to show that there were funds. It may have been superfluous, perhaps, as there was no direct plea of *plene administravit*, or want of assets ; but the admission of superfluous evidence is not matter of error, if it be connected with the subject in dispute. It was direct and pertinent evidence to charge App with two hundred pounds. It was also evidence to charge Kleppinger. *Prima facie*, an executor is chargeable with all

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the separate debts of his testator. But it is argued, that App had filed an account, which had been confirmed, and thus the plaintiff below was concluded. To this it may be [*298] *answered, in the first place, that Kleppinger had settled no account. There was, therefore, no decree that he should not be charged with the money now claimed. There are cases in which he would be chargeable. If it was a debt due to the testator, it was his duty, as executor, to do all in his power to collect it. Perhaps he could not sue his co-executor, but when his co-executor settled his account, he might, and ought to have appeared in the Orphans' Court, and insisted upon this as an item of charge against him. An executor is liable for such acts of negligence, or careless administration, as tend to defeat the rights of creditors or legatees. Toller, 426. So, if he delays bringing suit until the debt is barred by the statute. Ib. 427. Perhaps the only mode by which an executor or administrator can compel another to pay his debt, is by charging him with it in the account. Simon v. Albright, 12 Serg. & Rawle, 429. This course he is bound to adopt. But the settlement of App's account was not conclusive, even as respects himself. The decree was merely, that the balance of the account was just; not, that he should not be chargeable with the sum in question. The evidence was, therefore, not to contradict the decree. The question of the conclusiveness of a decree of the Orphans' Court, upon the settlement of an account, is still open, at least, as to its extent. The old law, undoubtedly was, that it was no more than *prima facie*, to be deemed correct, but might be shown to be otherwise. This was the doctrine of Marriot v. Davey, 1 Dall. 164; Miller v. Young, 2 Serg. & Rawle, 518; Dasher v. Leinawever, 3 Serg. & Rawle, 200; Kohr v. Fedderhaff, 4 Serg. & Rawle, 248. An examination of the cases, which at first may seem to draw that doctrine into question, will produce a different result. Huckle v. Phillips, 2 Serg. & Rawle, 4; Bickle v. Young, 3 Serg. & Rawle, 234; Snyder v. Snyder, 6 Binn. 483; Selin v. Snyder, 7 Serg. & Rawle, 166, and Kennedy v. Wachmuth, 12 Serg. & Rawle, 171, were all cases in which the title to real estate was affected; and the court decided, that the proceedings of the Orphans' Court, on which title depended, were conclusive. M'Pherson v. Cunliff, 11 Serg. & Rawle, 429, went on the same principle. It was an adjudication *in rem*, and like all other judgments *in rem* to which the whole world are parties, was conclusive. This feature belongs to all the cases prior to M'Fadden v. Geddis, 17 Serg. & Rawle, 340. These cases, therefore, do not apply to a case of this description, which is an action for a legacy, as to which the act of assembly gives to the courts of law peculiar

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powers. *Groff's Executors v. Groff*, 14 Serg. & Rawle, 181, was the case of a decree for the sale of land, and the extent of the decision was, that such a decree should be held valid.

But whatever may be the rule as to a decree confirming a final account, it clearly does not extend to the confirmation of an account not final. By the settlement of a final account, a previous account, settled and confirmed, is opened. Case of *M'Grew's Appeal*, 14 Serg. & Rawle, 396. The account settled by *Fredrick App*, was *not final. Whether or not the item [*299] in dispute would be a fair charge depended on a contingency. No account can be called final, which does not present for investigation, every item which can be brought into view.

2. The observations on the first point, being applicable to the subject to the second assignment of error, it need not be pursued further.

3. Of the opinion of the court on the question of advancement, the plaintiff in error has no ground of complaint. The court answered this part of the case precisely as they were requested by his counsel, when they replied to his second point, and still more strongly in their reply to the first proposition of the defendant in error. Besides, a question of advancement may be one of mere law, or of mingled law and fact. If it depends solely on a written instrument, it is a question of law; but that was not the case here, for the judge says, there was parol evidence, and in such a case, it is a question for the jury. The answer of the judge was, in fact, more favourable to the plaintiff in error, than the case justified. In the article of agreement, there is nothing like advancement. It is a contract for the bargain and sale of land. An advancement must be complete in the lifetime of the testator. It is an act *inter vivos*. *Toller*, 380. The expressions in the will, which does not take effect until after death, cannot make that an advancement, which was not so before. They might throw light upon the testator's former intention, and the jury might draw inferences from them, but they could operate no further.

4. To show, that the court below was right in saying, that a debtor is not discharged by being made the executor of his creditor, it is only necessary to refer to *Griffith v. Chew*, 8 Serg. & Rawle, 17; *Pusey v. Clemson*, 9 Serg. & Rawle, 204; *Simon v. Albright*, 12 Serg. & Rawle, 429.

5. It cannot be disputed, that executors and administrators are trustees for creditors, legatees, and next of kin. It is equally indisputable, that a trustee cannot avail himself of the statute of limitations. *Johnston v. Humphreys*, 14 Serg. & Rawle, 395.

6. There was nothing wrong in the answer of the court below

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to the plaintiff's third proposition. They said, that the suit was correctly brought against the two executors; but added, that if both have not jointly received assets, they are not jointly liable. The act of assembly of the 21st of March, 1772, *Purd. Dig.* 517, seems to require the action to be against all the executors or administrators who act. They may, however, sever in their pleas, and he who has not received money, may show the fact, and be discharged. They may both, or either of them, plead no assets, and the judgment will be accordingly.

The opinion of the court was delivered by

HUSTON, J.—This was a suit by Henry Dreisbach, a son-in-law of *Michael App, against Frederick App and Ludwig Kleppinger, executors of said Michael, under the following circumstances:

The will of Michael App was proved 5th August, 1809; it contained among other things this clause: "I have sold to my son, Frederick App, a piece of land situate in Lehigh township, as per agreement made and executed the 18th November, 1780, for the sum of three hundred pounds. One hundred pounds have been paid to me by my son. The other two hundred pounds shall be settled with him after my decease, on account of his portion." Then followed a bequest of fifty pounds to one child, to make it equal to what each of the others had received, and he adds, "It is further my will that all the rest of my property shall be sold and equally divided, as much as possible, among my four children."

There was then given in evidence the article of agreement above referred to, and a bill of exceptions to the admission of it was taken; but why said exception was taken, we were not told: also, the plaintiff gave in evidence the settlement of an administration account by the defendant, as executor, on the 8th of May, 1813. The defendant showed that this account was confirmed by the Orphans' Court in June following, and the balance in the hands of the executor ordered for distribution. In this account, mention is made of this sum of two hundred pounds from the son to his father, but that it was not put in the inventory, nor charged to the executor.

In November, 1815, Henry Dreisbach gave a receipt in full for the sums awarded by the Orphans' Court to him. In 1823, this suit was brought, on the ground that the sum of two hundred pounds before mentioned in the will was a debt due from Frederick, for which he ought to have settled in the account of his executorship, and parol evidence was given on both sides, as to what was the intention of the father, and the understanding between him and his son, as to its being an advancement to the son.

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The declaration contained two counts. The first stated the will, death of testator, letters testamentary to the executors, and without taking notice of the settlement of their accounts, or of the sum ordered for distribution, charged that there remained in the hands of the executors, seven hundred and nine dollars and sixty-three cents, beyond all debts, funeral expenses and specific legacies, one-fourth of which the plaintiff below claimed, &c. The second count charged them, as executors, for money had and received. Several points were embraced in the discussion of this cause, which are not necessarily to be decided at this time. It was contended that on the proof in this case there could be no recovery, because no money was received, or alleged to have been received, by either of the defendants. I incline, however, to the opinion that, in some way, an executor who is indebted to the estate of his testator, can be reached, as having the money in his hands. In *Wilson v. Wilson*, 3 Binn. 557, a distributive share found on settlement of the account in the Orphans' Court to be in the hands of the executors, and undisposed of by the will, was recovered in *assumpsit*, though [301] the court was divided. The first section of the act of 1713, establishing our Orphans' Court, speaks of recovering at common law the sum found, on settlement, to be in the hands of the executors, or administrators. I do not know that any precise form of action has been established. The act of April, 1823, allows transcripts of the settlement of such accounts to be filed in the Common Pleas, and actions of debt, or *scire facias*, to be sued on them.

This suit is not for a balance found on a settlement of the amount in the Orphans' Court, but for a sum decided in the Orphans' Court not to be due. It is, in effect, an appeal from the decree of the Orphans' Court, not formally and according to law, but an attempt to overrule it in another court. This matter has been before us repeatedly, and would seem to be settled to a certain extent, viz., as to the items set out in the account, as settled, and directly acted on by the court. How far an account settled before the act of 1819, or even since that act, may be held conclusive as to matters concealed by the executor, administrator, or guardian, at the time of settlement, and equally unknown to the court and those interested, it is not necessary now to state.

Another ground taken was, that if there could be a recovery against Frederick App, one of the executors, who was alleged to be debtor to the estate, yet there could be no recovery against Kleppinger, the other executor, who had nothing in his hands, and who had no power to sue his co-executor. The judge told the jury so expressly. Perhaps, however, Kleppinger was him-

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self in fault ; he ought to have pleaded separately ; and if the plea of *plene administravit* had been found for him, he was safe. "In an action against administrators, though the plaintiff may fail as to one, on the plea of *plene administravit*, he may recover against the other." 1 Chitty Pl. 353, 6 ; 2 Tidd's Practice, 1023.

This was nothing more nor less than a suit for a legacy. Where an act has given a remedy at law where there was none before, as was perhaps the case here, that remedy ought to be followed. Where that act, or another one says, that remedy alone shall be pursued, it must be followed. The act of the 21st of March, 1772, gives the legatee an action on the case, debt, detainue, or account render, as the case may require. By action on the case, I would understand an action stating the case as in the first count here, with the addition of stating the decree. It has been said, before the law of 1806, that *assumpsit* did not lie for a legacy : since that act I can have no doubt. The act of assembly gives, in the third section, a power to appoint auditors, on the plea of want of assets, but not to ascertain the amount of a residuary legacy ; and I would say that a residuary legatee must compel the executors to a settlement in the Orphans' Court, and thus ascertain the amount, or must bring account render, in which a statement of all assets will be exhibited ; otherwise, different legatees, entitled to equal parts of [*302] the residue, *may recover very unequal sums, and the executors may be put to intolerable trouble, in proving their whole administration in each suit.

The executors pleaded the statute of limitations. The court decided that it did not apply to this case, being a trust, &c.

That the statute of limitations does not apply in cases of trust, or cases of fraud, is an assertion to be found in every law-book, and many decisions, not reconcilable with each other, are in the reports of different courts. The labour and the discrimination of the different courts of New York have saved the profession much trouble on this subject. In *Decouche v. Savetior*, 3 Johns. Ch. 216, 217, this matter came before Chancellor Kent. He there seemed to adopt the broad principle that, in all cases of direct and express trust, the statute did not apply. The matter was again before him, and was again considered, in 5 Johns. Ch. 522 ; *Coster v. Murray*, and lastly, in 7 Johns. Ch. 90, *Kane v. Bloodgood*. In this last case he retracts the position taken in the former, and says every deposit is a direct trust ; every person who receives money to be paid to another, or to be applied to a particular purpose, is a trustee. The cases of hirer and letter to hire, borrower and lender, pawnor and pawnee, principal and agent, are all cases of express trust ; yet such

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cases are not taken out of the operation of the statute of limitations, when sued at law, and ought not to be, and are not, by the better decisions in chancery, and he comes to the conclusion that the trusts not to be affected by the statute in chancery are those technical and continuing trusts which are not cognizable at law, but which fall within the peculiar and exclusive jurisdiction of chancery. I shall not go over all the cases which his research has collected, but content myself with citing those which he has cited, as establishing the law on the best and most reasonable foundations in England, and which are adopted by him.

Precedents in Chancery, 518, *Lockey v. Lockey*. This was a bill for an account of the profits of an estate received while the plaintiff was an infant, but not brought until more than six years after the plaintiff came of age. The plea of the statute of limitations was allowed, as much as it would be in an action of account at common law; if the infant lies by for six years after he is of age, he is bound at law, and so he shall be in the Court of Chancery. There was no necessity to apply to that court, and no sort of difference in reason between the two cases.

In *Prince v. Heylin*, 1 Atk. 493, Lord Hardwicke held the statute was a bar in chancery, as well as at law, to any demand from one tenant in common against another, for an account, further back than six years.

In *Sturt v. Mellish*, 2 Atk. 612, Villa Real had been appointed attorney, to demand and receive money from the government of Portugal. A bill was filed against the executor of Villa Real for an account. The statute of limitations was pleaded, and *held a bar. "A trust is such a confidence between the parties that no action will lie at law, [*303] but is merely a case for the consideration of chancery; every bailment might as well be called a trust as this."

In *Smith v. Clay*, 3 Bro. Ch. 639, (note,) Lord Camden says: "As often as parliament has limited the time of actions and remedies at law, the Courts of Chancery have adopted that rule, and applied it to similar cases in equity."

Chancellor Kent follows the decisions down to the present time, and adopts, as the result of them, and as the true rule, that,—if a party has a remedy at law, and, instead of bringing his action, lies by, and then resorts to equity, he is bound wherever he would have been at law.

This matter came before the Court for the revision of Errors in New York, and the doctrines above stated were fully recognised.

Chief Justice Spencer says, (20 Johns. Rep. 585,) "It is im-

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possible, in a case like this, where there was ample remedy at law, that the change of the process should produce such a change in the rights of the party." And again: "I have no hesitation in saying that, in a case where there is a concurrent jurisdiction in the courts of law and of equity, the rule must be the same, and the statute of limitations may be pleaded with the same effect in the one court as in the other."

In this state we have no Court of Chancery: all our remedies are at law, and sought for by action. Our statute of limitations says, all actions of, &c., &c., shall be brought within the following time and limitation, and not afterwards—and then specifies the time for different forms of action. We have adopted certain rules by analogy, as to forms of action not specified, and we have supposed certain cases of trust to be within the exceptions adopted in courts of chancery, where such courts exist. Courts of chancery, and the proceedings in them, are not mentioned in the statute of limitations in England and New York. Not being within the letter of the law, they have yet, as I have shown, conformed to the law, in all cases where the remedy might have been at law. All our remedies are at law, and must be at law, in most cases. I do not, however, say we have no cases not within the statute of limitations; practice seems to have settled it otherwise.

Our Orphans' Courts have chancery powers. An executor, or administrator, is a trustee for creditors and for next of kin, or legatees; but when he has filed and settled his account, if there is a balance in his hands, perhaps he ceases to be a trustee, and becomes a debtor for that balance from the time of the settlement. The settlement may be made a judgment, by filing it in the office of the prothonotary of the Common Pleas. Perhaps it must, to preserve its lien, be revived every five years; at all events, it would be considered as satisfied in twenty years, if there should be no proceedings on it. It is not, then, one of those trusts which would last for ever.

[*304] *The demand, in this case, is not for a sum appearing due on a settlement in the Orphans' Court. It is for a sum charged to be due, but denied now, and denied at the settlement; due, if at all, from a man who, though acting in the character of a trustee at one time, put off that character openly, by record, and according to law, ten years before this suit was brought. If he is, or ever was, a trustee for the sum demanded, he is not made so by the will, or the article of agreement, or by any writing; for the opinion of the court was, that, on the written testimony, this sum was an advancement. If a trustee at all, he is made so by parol testimony, and evidence extrinsic the will and the letters testamentary. Against him

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there was always a remedy by appeal from the decree of the Orphans' Court, or by action at law. If he is a trustee at all, he is not so in a sense which would take from him the protection of a chancery statute of limitations, where they have a Court of Equity. It therefore must protect him here.

Something was said of want of notice to Dreisbach of this settlement. In point of fact, he had actual notice, for he received and gave a receipt for the sum due by the decree of the Orphans' Court, in 1815; and this suit was brought seven years after; but I do not rely on this. The notice given, agreeably to the rules of the court, and more especially by direction of the acts of assembly, must have the same effect as actual notice, and bind equally. We have many laws directing notice to be given by advertisement, &c.; so they have in all countries; and we hear too much in court about hardship, for want of actual notice. The notice directed by law must be good and effectual, and we ought not to hear any complaints on that subject.

There was no fraud—no concealment—the executor stated explicitly the sum referred to in the will and article, and said he was not chargeable. To call on him, after twenty years from his father's death, and ten years from his settlement, to enter into a contest to reverse his settlement on parol proof, would be hard, if the law permitted it. Many of those who knew about it must be dead.

The court, then, ought to have told the jury, that, whatever may be the case as to matters left out of an administrator's account, concealed, or kept back, yet, as to this item, inserted, acted on, and the balance received, the account was conclusive; and that, by the settlement of the account in due form of law, and payment of the balance, the executors ceased to be trustees; or, if they are so, are only such by extrinsic proof: that there was a full remedy at law, the same in 1813 as now; that their case was within the letter and spirit of the statute of limitations: that they were not such creatures of a Court of Equity, as that there was no remedy at law, and that the statute would be a protection against a bill in a Court of Chancery.

The principles above stated, as to the statute of limitations in cases of trust, will be found recognised by Judge Washington, *C. C. Rep. 631; *Wisner v. Barnet* and others; and [*305] was adopted in cases analogous, in *Piper v. Lodge*, 4 Serg. & Rawle, 316, and in *Brown v. M'Coy*, which was this: *Brown* and *M'Coy* were tenants in common by agreement, and payment of equal parts of the price. *M'Coy* was in possession and died. His children entered, and occupied it as their own; in fact, they never heard of the claim of *Brown*. I held, that

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twenty-one years barred the claim of Brown, and the Supreme Court affirmed the judgment.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 2 Penn. R. 522; 5 R. 272; 2 Wh. 300; 5 Wh. 62; 6 Wh. 65; 2 W. 212; 5 W. 90; 6 W. 379; 7 W. 46; 8 W. 15; 10 W. 56; 3 W. & S. 368; 6 W. & S. 195, 450, 510; 7 W. & S. 360; 1 Barr, 373; 7 Barr, 62; 1 J. 210; 2 J. 349; 1 C. 94, 190; 10 C. 356; 3 Wr. 95; 11 H. 454; 3 Wr. 97; 3 S. 462; 3 O. 128, s. c. 11 W. N. C. 555.

Cited by the Court, 4 Wh. 478; 2 W. 489; 1 W. & S. 118; 5 Barr, 512; 10 Barr, 242; 12 H. 487; 12 Wr. 522; 2 O. 425.

This case was explained in 2 W. 162, and the remark that an executor after filing his account had the benefit of the statute of limitations, was characterized a dictum; and it was at the same time decided that an action to recover a legacy is not barred in six years. The rule now is, that to exempt a trust from the bar of a statute, it must be, first, a direct trust; secondly, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and thirdly, the question must arise between trustee and *cestui que trust*: 1 W. 275; 1 W. & S. 118. It has been held that an assignment for creditors is such a trust: 12 H. 487.

[PHILADELPHIA, JANUARY, 1830.]

English *against* Harvey and Another, Executors of Cox.

In determining whether a legacy is charged on the land, in case of a deficiency of personal estate, the whole will must be taken together.

A legacy held to be a charge upon the land, from a view of the whole will.

An executor or guardian is personally liable for interest which actually comes into his hands, and which he neglects to put out, or pay over, according to his duty; but he is not liable for compound interest.

Therefore, where a testator directed, that nine thousand dollars should be put out by his executors at interest, for the benefit of a legatee, who was to be supported, and educated out of the interest, and that the surplus interest should be kept out at interest until the legatee should attain the age of twenty-one years; held, that the executors were not personally liable for compound interest.

If a testator has in his lifetime put out the money bequeathed, at five per cent., and it does not become due until after his death, the legatee is only entitled to five per cent. until the money becomes payable.

And generally, if the testator directs money to be put out on land security, and no more than five per cent. can be obtained on such security, the executor is only answerable for the five per cent. received.

THIS suit was brought in the Supreme Court to December Term, 1824, by Charles English, against Isaac Harvey and George Williams, who survived Thomas Norton, executors of William Cox, deceased.

The declaration set forth, that William Cox, by his last will and testament, dated the 18th of August, 1810, bequeathed to the plaintiff the sum of nine thousand dollars, if he should live to attain, and when he should attain the full age of twenty-one

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years : That the testator appointed Thomas Norton, since deceased, his executor : That afterwards he died, and the defendants, with Norton, proved the will : That the plaintiff had attained the full age of twenty-one years, by means whereof, and by force of the act of assembly, the defendants became liable to pay the said nine thousand dollars, and promised, &c.

The defendants pleaded *non assumpserunt*, and *plene administraverunt*. The plaintiff replied to the last plea, that the defendants had not fully administered. [*306]

On the trial, at Nisi Prius, before Mr. Justice Tod, on the 24th of November, 1829, the will of William Cox was given in evidence in which the testator, after directing all just debts and funeral expenses to be paid, gave to his widow, Mrs. Ruth Cox, his household goods, kitchen furniture, and wearing apparel. He then gave an annuity of one hundred dollars to Priscilla Lloyd, during life ; an annuity of one hundred dollars to Sarah Bristol, during life ; an annuity of two hundred dollars to Jacob Kennard and Mary, his wife, during their joint lives ; and an annuity of one hundred dollars to the survivor of the two last named, during life. All these annuities were directed to be paid out of the real estate.

The will then proceeds :—

“6. *Item.* Whereas, it has been represented to me, that my late son, John G. Cox, deceased, has left a natural son, named Charles English, who was born on the 11th day of the month called July, 1802 : That the real name of the mother of the said child is Emily Comcey, but that having adopted the surname given to the child, she now passes herself under the assumed name of Emily English ; and at the time of the birth of the said child, she, the said Emily, lived in Walnut Street, between Tenth and Eleventh Streets. Now, therefore, I do hereby give and bequeath unto the aforesaid Charles English, the said natural son of my said late son, John G. Cox, the sum of nine thousand dollars, lawful money of the United States of America, to be paid to him if he shall live to attain, and when he shall attain the full age of twenty-one years ; and I will and direct, that my executors shall put and keep the said legacy of nine thousand dollars out at interest, on good and sufficient land security ; and that they, my executors, shall apply so much of the interest thereof as shall, from time to time, be necessary to the maintenance, clothing, and education of the said Charles English, from time to time, during his minority, it being my desire, that he shall have a good, plain, and useful education, but not to exceed a moderate knowledge of the mathematics, which will fit him to become a useful man, without his being in any wise tinctured with ‘philosophy, falsely so called.’

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"7. *Item.* I give and bequeath to my friend, Isaac Harvey, the sum of five hundred and forty dollars, being the amount of one year's interest of the said legacy, bequeathed to the said Charles English, to be paid to the said Isaac Harvey in such quotas from year to year, as shall be the balance of the interest of the said legacy, bequeathed to the said Charles English, from year to year, after the costs, charges, and expenses of his, the said Charles English's maintenance, clothing, and education, shall thereout, from year to year, have been first deducted and paid. And after that legacy to the said Isaac Harvey, shall have been paid in the manner and form aforesaid, then the [*307] surplus of the interest of the said *legacy, bequeathed to the said Charles English, beyond the expenses of his maintenance, clothing, and education, shall be put and kept out at interest, for the benefit of him, the said Charles English, until he shall attain the full age of twenty-one years."

In case of the death of Charles English before he attains the age of twenty-one years, the legacy of nine thousand dollars is disposed of to others.

"8. *Item.* As for and concerning my house and lot, No. 40 North Front Street; house and lot, No. 51 North Front Street; house and lot in Garden Alley, commonly called Comb's Alley, and bank lot in Front Street; and generally, as for and concerning all the rest of my estate, real, personal, and mixed, not hereinbefore otherwise disposed of, I give and bequeath the whole income thereof to my said wife, Ruth Cox, for and during all the term of her natural life, she paying thereout, the taxes and necessary repairs, and also the several annuities hereinbefore mentioned.

"9. *Item.* From and after the death of my said wife, I give the use and income of my said house and lot in Garden Alley, called Comb's Alley, in the said city, where I dwell, with the appurtenances, unto my wife's sisters, Priscilla Lloyd and Sarah Bristol, part and share alike, during their joint lives, and to the survivor of them wholly during the remainder of their natural lives, they paying the taxes thereof, and keeping the buildings in tenantable repair, and after the death of them, and the survivor of them, the same shall go into the mass of my residuary estate, as hereinbefore devised.

"10. *Item.* As for and concerning my said house and lot in Garden Alley, with the appurtenances, after the death of my said wife, and her sisters, Priscilla Lloyd and Sarah Bristol, and of the survivor of them, and also for and concerning all the rest, residue, reversion, and remainder of my estate, real, personal, and mixed, not hereinbefore otherwise disposed of, I do give, devise, and bequeath the same, and every part, and parcel thereof

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unto my friends, Isaac Harvey, Thomas Norton, and George Williams, their heirs, &c., in trust, &c., and appoint them executors."

To this will the testator added a codicil, dated October 6th, 1810, in which he recited, that eight thousand dollars had been lent to Isaac Harvey at five per cent. per annum, and ordered, that his appointment as executor should not operate as a release of the debt: That Isaac Harvey should not be executor thereof, but should account for the same to the other executors, and revoked the legacy of five hundred and forty dollars, given to him by the will.

The testator died on the 30th of April, 1811. An inventory and appraisement of the goods, &c., were filed in the register's office on the 22d of May, 1811. On the 15th of June, 1812, Isaac Harvey settled an account in the register's office, and an additional account on the 10th of February, 1829, both of which were confirmed by the Orphans' Court, since the institution of this suit. In January, *1821, Thomas Norton died. In March, 1821, George Williams took out letters testam- [*308]mentary. On the 21st of March, 1821, George Norr, executor of Thomas Norton, settled his account in the register's office, and paid over the balance in the hands of Mr. Norton at the time of his decease, to the said George Williams. On the 17th of July, 1823, George Williams settled his first account as executor of William Cox, in the register's office. The accounts, both of Norr, as executor of Norton, and of Williams, as executor of Cox, were confirmed by the Orphans' Court, before the institution of this suit. On the 21st of September, 1826, George Williams settled his additional account, which was confirmed by the Orphans' Court.

In February, 1822, Mrs. Cox, the widow of the testator, died; since which time, Isaac Harvey received the proceeds of the real estate of the testator, and had the balance of the income of the real estate in his hands, after deducting the sum of one hundred dollars per annum, paid to one of the annuitants, who was still living, and the expenses of executing the trust.

On the 10th of February, 1829, Isaac Harvey settled his accounts as executor of William Cox, in the register's office, embracing only the income of the real estate of the testator, by which there appeared to be a balance remaining in his hands of one thousand three hundred and forty-two dollars and nine cents, which was invested, by order of the Orphans' Court, and his account confirmed.

A verdict was entered in favour of the plaintiff for three thousand seven hundred and sixteen dollars and ninety cents, subject to the opinion of the court, upon the following agreement:—

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"It is agreed, that the verdict be subject to the opinion of the court on the following points, viz. :—

"1. Whether the defendants have assets in their hands, and to what amount they are answerable.

"2. What balance, if any, is due to the plaintiff; and what part thereof, if any, is chargeable to the defendants.

"3. Whether the said legacy is chargeable on the real estate of the testator.

"4. Under the second of these heads it is understood and agreed, that the court are to decide the question of interest.

"And it is further agreed, that the court, under all the evidence in the case, may amend the verdict and judgment, so as to effectuate the rights of the parties, without regard to form."

Sergeant, for the plaintiff, cited, *Bitzer's Executor v. Hahn and Wife*, 14 Serg. & Rawle, 238; 1 Johns. Ch. Rep. 620; *Hassanclever v. Tucker*, 2 Binn. 525; *Tucker v. Hassanclever*, 3 Yeates, 294; *Witman v. Norton*, 6 Binn. 395.

Chester and Chauncey, for the defendants, referred to 2 Johns. Ch. Rep. 632; *Nichols v. Postlethwaite*, 2 Dall. 131.

The opinion of the court was delivered by

HUSTON, J.—Several questions have arisen in this case. One, [*309] *whether the legacy to Charles English was payable out of the land, in case of a deficiency of the personal estate. Real as well as personal estate is liable to debts of every kind, due by the living or the dead, in this state; so far we differ essentially from England. In many parts of this state, the amount of personal property is generally small; often not enough to pay the debts, and seldom leaving much balance after paying them. The testator has been all his life accustomed to consider real and personal property as equally a fund to pay any demand, and it would not be probable, that he should forget this when making his will. In the language of the counsel, not likely that he should imagine himself in England; or, make a will with a view to their laws. Our courts have not adopted the rules in the old books. I would not, however, rely on the residuary clause only. "All the rest of my property real and personal, I give," &c. It may be a clue to the intention of the testator; it may tend to show an idea blending real and personal estate, but nothing is more unsafe than attempting to construe a will from any one clause of it. The whole will must be viewed; and it will be found necessary, often, to control very plain and positive expressions, by other parts of the will. We all agree, however, that in this case it is apparent, that the testator intended

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Charles English should receive nine thousand dollars, and not any less sum. The time when he was to receive it, admits of no doubt; but there is a difference of opinion as to the interest on that sum, and as to the liability of the executors. The sum of nine thousand dollars was to be put at interest, on landed security; from the interest Charles English was to be supported and educated, and what of the interest remained after this, was again to be put at interest for the benefit of the said Charles English, until he arrived at the age of twenty-one years.

It has been contended, that by this will, the executors were to put out the interest every year, so as to raise compound interest; they have not done so, and for this they are said to be personally liable. No executor or guardian has yet been charged with compound interest in this court. In *Say's Executors v. Barns*, 4 Serg. & Rawle, 112, Dr. Say was charged with the interest he received, and interest on it up to the time of paying it over, but not compound interest. No man can, during his life, get compound interest from his debtor; and I am not sure, that any man in this country can subject those who come after him to it. The law makes executors or guardians liable, generally, for interest on money which comes to their hands, and which they ought to put out, or to pay over. I have not yet met a case where more has been given.

This testator charged annuities on his real estate, and subject to these he gave it all to his wife during her life. As long as she lived, which was till 1821, the executors could not touch it. He also gave to his wife, specifically, all his household furniture. The remaining personal estate amounted to eight thousand two hundred and seventy-five dollars. In the lifetime of the testator, he had lent eight thousand dollars of this to Isaac [*310] and Job Harvey at five per cent., payable in 1814, and interest annually. This formed a large part of the personal estate, and the only available part for several years. As it was, by the act of the testator, put, for a time, out at five per cent., the devisee must be contented with five per cent. on this eight thousand dollars, until the bond fell due in 1814; and, generally, if a testator directs money to be put out on landed security, and no more than five per cent. interest can be obtained on such security, the executor is answerable only for the five per cent. received, and the legatee who is to get the interest can get no more.

As to the two hundred and seventy-five dollars, produced by the other personal estate, there was nothing amiss in keeping this for contingencies, so long as Isaac Harvey kept it.

Norton, the executor, deceased, had the whole fund till March, 1821, when his account was settled, and the balance paid over to

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Williams. The amount of Harvey's bond had been paid to him in 1820, and re-invested, together with the interest which had accumulated, and the two hundred and seventy-five dollars and eighty-four cents in other bonds and mortgages. Norton being dead, his account is only incidentally before us. We may say, however, that as his account was not excepted to, it appears final. Williams also settled his account, and paid over the money in his hands, and assigned the bonds and mortgages, which have been accepted. There is no ground for any charge against any of the executors, personally. As to the eight thousand dollars, and its interest, we leave the accounts as they are. So, also, as to the two hundred and seventy-five dollars and eighty-four cents of personal estate. But although the executors are not chargeable with interest on this last sum, the devisee is entitled to it out of the estate. There is something relative to a part of the proceeds of the real estate being given by the widow, or Harvey, to Norton, about September, 1817, to make up the deficiency in the nine thousand dollars, which I do not understand. Whatever was so paid, then, to Norton, and left with him, is to be taken as part of the real estate then applied towards making up the amount of the legacy. These last two sums do not, together with the eight thousand dollars, make the legacy. The deficiency must come from the real estate with simple interest; and, also, as much as will pay interest on the two hundred and seventy-five dollars and eighty-four cents, and on the sum paid by the widow to Norton, up to the time when these sums were paid to him. The verdict and judgment will be ascertained by calculating on these principles; and for the sum thus ascertained, there will be judgment against the executors, not personally, but to be levied from the estate of the testator.

Cited by Counsel, 9 Barr, 430; 10 C. 265; 11 C. 55; 12 C. 12, 185; 2 G. 383; 1 Wr. 326; 5 Wr. 498; 7 S. 51; 9 S. 100; 4 N. 369; 11 N. 416, s. c. 9 W. N. C. 122.

Cited by the Court, 5 R. 332; 5 Barr, 91; 2 N. 353, s. c. 4 W. N. C. 268.
 Criticized, 9 S. 101.

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*[PHILADELPHIA, JANUARY, 1830.]

M'Euen and Others *against* Girard.

The time required to bar a claim by the act of limitations, is not enlarged by a transfer of the claim. All the successive owners of it, have, together, only the time which the original claimant would have had.

THIS cause having been tried before Mr. Justice TOD, at Nisi Prius, where a verdict was rendered under his direction for the

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defendant, a motion was made on behalf of the plaintiffs for a new trial, which now came on to be heard.

The facts given in evidence on the trial, as they appeared from a statement furnished by the counsel, were as follows :—

“The defendant was one of the commissioners appointed to receive subscriptions to the Bank of the United States. The books were opened in July, 1816, and after remaining open twenty days, a deficiency remained of three millions of dollars. The books were opened again on the 26th of August, and the defendant subscribed for the amount which remained.

“The plaintiffs allege, that they afterwards applied to the defendant for some of the shares (two thousand eight hundred and twenty-five,) which he had subscribed for, and he agreed to let them have them.

“Part of the subscription was in funded debt of the United States. But the bank was not organized until the 4th of November, and this part of the subscription could not be paid by transfer, until subsequently to that day. The interest, therefore, of the United States' loan, which became due on the 1st of October, was received by the individuals who still continued to hold the stock; and the defendant, on the 2d of that month, received the amount payable on his funded debt, subscribed to the bank, including that for the two thousand eight hundred and twenty-five shares which he had agreed to sell to the plaintiffs.

“On the 5th of November, the bank resolved, that the subscribers should be required to pay the interest on the United States' loan, which became due since the 1st of July, 1816.

“On the 7th of November, a resolution was adopted, to reconsider the resolution of the 5th. On the 25th of November, the resolution of the 5th of November, was rescinded; and, on the 7th of January, 1817, the cashier was authorized to return the interest to such subscribers as had paid it to the bank.

“The amount received by the defendant, of interest, on the proportion of the United States' stock, subscribed for the shares sold by him to the plaintiffs, was one thousand and fifty-nine dollars and sixty-seven and a half cents.

*“For the recovery of this sum the plaintiffs brought [*312] their suit by agreement to enter an amicable action, dated the 22d of November, 1822, and filed the 27th of November, 1822.

The defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*.

The charge of the court was in favour of the defendant on the latter plea, and the verdict was given accordingly.

T. Sergeant and Sergeant, for the plaintiffs.—The contract of

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the parties is to be ascertained from all the circumstances of the transaction, and must be taken to have been, that the plaintiffs should be placed by the defendant in the same situation as if they had actually subscribed for the two thousand eight hundred and twenty-five shares. Had the plaintiffs been actual subscribers, they would have received the quarter's interest, and would have had a perfect right to it, upon the bank's relinquishing its claims.

The suit was brought in time. After the day of subscription, the bank had a clear, equitable interest in the proceeds of the stock. The claim of the bank being superior to that of the plaintiffs, suspended their right, while its own was asserted. The money belonged to the plaintiffs equitably and legally, only after the bank had relinquished its claim. This was done on the 7th of January, 1817; and the agreement to enter this action, was signed on the 22d of November, 1822. Up to this period, the defendant held the money as trustee for the bank, and subsequently, as trustee for the plaintiffs. If the plaintiffs had been actual subscribers, they would have received the interest on the 2d of October, but would have had no right to hold it for their own use until the bank had abandoned their claim.

Binney, for the defendant.—The contract was simply for the sale of two thousand eight hundred and twenty-five shares of bank stock to the plaintiffs. The defendant had fulfilled his part, by transferring the shares to such persons as the plaintiffs indicated, and there the business ended. Mr. Girard had subscribed for the whole balance which was not taken, and thus rendered a service to the public, because the amount required to be subscribed by individuals might not otherwise have been made up. He gave his money for the stock, and the plaintiffs were to have a certain number of shares for their money. There was no agreement until the 27th of August, 1816, when the defendant gave the plaintiffs scrip certificates, by which he engaged to transfer a certain number of shares, which he has done.

If the plaintiffs ever had a cause of action, it accrued on the 2d of October, 1816, when the quarter's interest was received. The bank never had any right to this interest, and the resolutions passed by the directors, amounted almost to an acknowledgment, that they had no right. The defendant was a purchaser of the stock, and was entitled to the interest which became due upon it. If, however, the bank had a right, then [§313] there was no right in the plaintiffs; and *an abandonment of the claim of the bank would vest no right in them. And if the relinquishment was in favour of the plaintiffs, the defendant held adversely to those under whom the

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plaintiffs claimed, and the statute having begun to run against the bank, continued to run against the plaintiffs, who derived title from the bank. 4 Wash. Rep. 714.

The opinion of the court was delivered by

HUSTON, J.—This case arose out of the events which occurred about the time the stock of the United States Bank was taken, and out of the measures adopted by the directors of that bank soon after it went into operation.

The defendant was one of the commissioners appointed to receive subscriptions. The books were opened in July, 1816, at different places in the several states, and continued open for a certain period. Time was given to inform the board of commissioners how much of the stock was taken. It appeared, that an amount near to three millions of dollars was still unsold, and the books were again opened on the 26th of August. After one or more persons had taken some shares, the defendant subscribed for all that remained, and paid the specie, and gave powers of attorney to transfer the stock due on such his subscription. Very soon after, the plaintiffs appeared, and expressed some disappointment at not having an opportunity to subscribe. The defendant agreed to transfer to them the number of shares which they wished, about two thousand eight hundred and twenty-five, and they paid him the sum in money which he had just paid, and transferred to him the amount of stock due, and which he had agreed to transfer to the bank. Others were in the same situation, or nearly the same, as the plaintiffs, with regard to other shares obtained from the defendant about the same time; and more than one suit has been tried between such persons and the defendant; and these suits have not all eventuated in the same way. Part of the subscription was in funded debt of the United States. The bank not being organized at the time of the subscription, this stock was not transferred at that time, but remained in the name of him who owned it; but powers of attorney were given to transfer it so soon as the bank was organized. About the 1st of November, the directors met. In the meantime, on the 1st of October, one quarter's interest fell due on the funded debt, and was received by the defendant on all the stock which he was to transfer to the bank on his subscription, and also on that which the plaintiffs had transferred to him. On the 5th of November, the directors resolved, that the subscribers should be required to pay to the bank the interest on the stock subscribed, which had fallen due after the subscription. On the 7th of November, a resolution was brought in and adopted, to reconsider the resolution of the 5th. Several other resolutions on this subject were before the board, and on the

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7th of January, 1817, the bank gave up its claim to the [*314] *disputed interest, and directed the cashier to return it to such of the stockholders as had paid it to the bank.

Mr. M'Euen, as well as the defendant, was a director of the bank at that time, and of course, had notice of, and took a part in these proceedings.

The plaintiffs contended, the true spirit and meaning of their contract was, that they were to have the two thousand eight hundred and twenty-five shares from the defendant upon precisely the same terms as if they had subscribed for those shares to the bank, from which they would have got the interest on the stock part of the subscription on the 1st of October, and that he having received it, was indebted to them for so much money had and received to their use. The defendant denied their construction of the agreement, and said, that he sold them so many shares of bank stock, and received the cash and transfer of funded debt and payment, and was absolutely entitled to that funded debt and its interest; and he also pleaded, and relied on the statute of limitations. The question, whether the bank was entitled to that interest, was one of considerable importance in the autumn of 1816, and has been very ably discussed here. The judge who tried the cause thought, and this court think, the defendant is protected by the lapse of time. This independently of that question.

• The claim of the bank, if valid, must have been pursued in six years, or would have been barred. They asserted this claim for a part of those six years, and then either abandoned it, or transferred it, so far as it relates to this subscription to the plaintiffs.

If the claim of the bank was valid, and they abandoned it, that left the money where it was, viz., with the defendant, and gave the plaintiffs no right to it.

If the acts of the bank are considered as transferring their right to the plaintiffs, then they transferred it as they held it, viz., a right vested on the 1st of October, or at most, on the 5th of November, and barred if not sued within six years from that time. This suit was not brought until after the lapse of more than six years from the 5th of November, 1816. It was brought on the 22d of October, 1822. The length of time requisite to bar a claim, is not increased by transferring the debt; all the successive owners have only the six years which would have been allowed to the original claimant. This part of the cause has been very ingeniously argued. It has been said, that while the bank claimed it, M'Euen and Co. could not sue for it: That while the bank claimed, Girard held it for them; and the implied promise to repay it, did not arise until their claim was at

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an end. Perhaps the true way to state the matter is this: If the bank had no right to it, the plaintiffs might have sued for it and recovered it, notwithstanding the claim of the bank. If they had a right, then the plaintiffs sue on the right transferred, and are barred, exactly when the bank would have been.

On the 7th of November, Mr. M'Euen knew of this claim. *Although he might not be certain whether the claim [*315] was available, that did not prevent the statute from running. It affects a doubtful claim as much as an unquestionable demand.

It was said, "I send money by A. to pay my debt to B., and B. accepts less than the sum sent; then, and not till then, the law implies a promise by A. to return me the money." Perhaps the moment I give the money to A., the law implies a promise, that he will return to me so much as he does not give to B. I do not speak of a case where A. fraudulently induces a belief in me, that he has paid all the money to B.

Statutes of limitation appear to me to admit of less latitude of construction than any other kind of law. Generally, where a money transaction has been totally unattended to for six years, it is because both parties know it to have been in some way settled; and know that this can be satisfactorily proved. Death of witnesses, or of one of the parties, who knows what witnesses to call, would often enable a party to recover it a second time. To prevent this, the law establishes a period, after which it shall not be inquired into. Men may differ in thinking that period too short or too long. The law settles all dispute. A day less than six years and there is no bar; a day after, and the claim is gone.

Under the name of trusts, many cases were at one time taken out of the statute. To effect this, it is now settled, it must be such a trust as is only cognizable in chancery, where such a court exists; and that claims, which in all countries are the daily and proper subjects of a suit at law, are always subject to the operation of this statute. The fraud, to take a case out of the statute, must be an actual imposition, a real deception practised. The mere omission to pay, will not have that effect; if it had, the law is a dead letter.

Motion for a new trial overruled, and judgment on the verdict.

Cited by Counsel, 2 Wh. 347; 7 Barr, 285; 8 C. 22; 7 S. 154.

[*316]

*[PHILADELPHIA, JANUARY, 1830.]

Hopkins *against* Conrad and Lancaster.

IN ERROR.

Where a person who is erecting a building, after having procured from a lumber merchant a certain quantity of lumber, becomes the owner of a note, payable in lumber, by the same lumber merchant, to a greater amount than the lumber furnished, and afterwards, more is furnished, exceeding in price the amount of the note, and a claim is filed under the mechanics' lien law, for the whole, the claim is *pro tanto*, extinguished by the note; and the builder and lumber merchant cannot agree afterwards to apply the note to the credit of another building, subsequently erected by the same person, against which the lumber merchant has neglected to file a claim in due time, to the prejudice of a third person, who has purchased the first house before the commencement of the second.

One who has conveyed a house with special warranty, and against whom, as the reputed owner, a claim is afterwards filed under the mechanics' lien law, is not a competent witness for his grantee, the real defendant, on the trial of a *scire facias* upon the claim.

WRIT of error to the District Court for the city and county of Philadelphia, in a *scire facias* upon a claim filed by the defendants in error, under the mechanics' lien law. The case was this :—

On the 1st of July, 1819, Conrad and Lancaster filed in the office of the prothonotary of the District Court for the city and county of Philadelphia, a claim in the following words, viz. :

“Conrad and Lancaster claim, in their own right, the sum of three hundred and forty-five dollars and thirty-four cents against Harker and Thorn, the owners, or reputed owners of a three storied brick house, situated on the south side of Walnut Street, between Eleventh and Twelfth Streets, in the city of Philadelphia, and against any other person or persons, owners or possessors of the said building, or otherwise, for lumber found and provided in and about the said building.

“CONRAD AND LANCASTER.

“Philadelphia, 6th mo. 30th, 1819.”

On this claim, a *scire facias* issued to December Term, 1820, to which the sheriff made the following return : “Made known to J. R. Hopkins, terre tenant.” J. R. Hopkins appeared, and pleaded, *non assumpsit*, and payment with leave, &c. The plaintiffs replied, *non solvit* and issues.

The cause was tried on the 19th of March, 1827, when a verdict was returned in favour of the plaintiffs for three hundred and forty dollars and forty-seven cents.

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On the trial, the plaintiffs gave in evidence their book of original entries, containing charges against Harper and Thorn, for lumber; the first of which was on the 23d of June, 1818.

*For the purpose of showing at what time the house was finished, the plaintiffs examined several witnesses, [*317] one of whom, a carpenter, swore, that he got lumber after the 15th of January, 1819, for shelving the vault: That he finished the other work between the 1st and 15th of January: That he hung the mahogany doors, put down carpet strips, and planed the floors after the 1st of January, 1819.

The defendant gave in evidence a deed for the premises from John Jackson and others to Abia B. Thorn, dated the 1st of November, 1817; a deed with special warranty from Abia B. Thorn to Howell Hopkins, dated the 15th of May, 1819, and a deed from Howell Hopkins to Joseph R. Hopkins, dated the 21st of June, 1819. He also produced several witnesses, who swore, that the house was finished about Christmas, 1818.

The defendant then offered the evidence of Abia B. Thorn, taken under a commission to New York. The evidence was objected to on the ground, that the witness was incompetent from interest. The court rejected the evidence, and at the request of the defendant's counsel, sealed a bill of exceptions.

Moses Lancaster, who was examined as a witness for the defendant, testified, that he sold a house to Conrad and Lancaster, and received from them notes, or due bills, payable in lumber to him or his order: That on the 11th of July, 1818, he transferred one of these notes, dated the 18th of March, 1818, for one hundred dollars, to Harker and Thorn: That about a year afterwards, he was informed by Harker and Thorn, that this note, or order, was lost, and an arrangement was made by Conrad and Lancaster, Harker and Thorn, and himself, that the note for one hundred dollars, which had been lost, should be replaced, and an order given by Moses Lancaster on Conrad and Lancaster, as if the first note had been presented: That this arrangement was made, and the order given on the 26th of February, 1820: That Conrad and Lancaster knew nothing of the arrangement, so far as the witness knew, before that time: That on the same day, the witness gave Harker and Thorn another order on Conrad and Lancaster, for one hundred and thirty-seven dollars and twenty-six cents, being the amount he then owed them, for work they had done to his house in Fourth Street, in the year 1817, for which they were to be paid in lumber: That Conrad and Lancaster knew of his arrangement with Harker and Thorn, but he did not know when they first became acquainted with it.

The defendant closed his evidence with the following receipt:

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"Rec'd, 2d mo. 10th, 1819, of Harker and Thorn, three hundred dollars, in full for carpenters' work, done in Walnut Street, between Eleventh and Twelfth Streets.
\$300.

"SAMUEL COPELAND."

[*318] *The plaintiffs then read in evidence to the jury two receipts, in these words :

"Rec'd, 7th mo. 3d, 1820, of Harker and Thorn, five hundred dollars, and their bond for three hundred and fourteen dollars and forty cents, dated the 1st inst., payable in one year, with interest ; which, when the bond is paid, will be in full for lumber, delivered in two houses, in Fourth Street.

"CONRAD and LANCASTER."

\$500.00 Cash.

314.40 Bond.

 \$814.40

"Rec'd, 2d mo. 26th, 1820, of Harker and Thorn, our order drawn in favour of Moses Lancaster, for sawed lumber, dated this day, for one hundred dollars ; and also, Moses Lancaster's order on us, for one hundred and thirty-seven dollars and twenty-six cents, which is on account of lumber delivered for two houses in Fourth Street, near Callowhill Street.

"CONRAD and LANCASTER."

\$100.00

137.26

 \$237.26

Samuel Copeland, one of the witnesses who had been previously examined by the plaintiffs, was again called by them, and testified, that he had done all the work in the house in Walnut Street, for Harker and Thorn, except the shelving of the vault, at the time he gave the receipt of February 10th, 1819 : That he had previously agreed to do this shelving, and did it afterwards, with lumber got of the plaintiffs : That when he had finished the house, Benjamin Harker said, "I want you to finish the vault, as Ware's house (next door) is :"—That they went into Ware's house, and saw the vault :—That this conversation took place between the 1st and the 15th of January, 1819, while the witness was putting on the mahogany doors.

The evidence on both sides being closed, the judge delivered to the jury, the following

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CHARGE:—"Two questions are made by the defendant's counsel.

"1. Whether the claim has been so filed as to create a lien, or, in the language of Mr. Hopkins, 'whether such a claim has been filed, in point of law, as to furnish a lien.'

"2. Whether the whole, or any part of the debt in question, has been paid?

"First, Was the claim filed within six months after the building was finished? Five or six witnesses have been examined by the defendant, who testify that the house was finished about Christmas, in the year 1818: the claim was not filed till July 1, 1819. Copeland, *the carpenter, says the building was not finished till February, 1819; that, while he was at [*319] work at the doors, Harker and Thorn contracted with him to finish the vault by making therein shelves like to those in the adjoining houses, which he did not finish till February, 1819; so that if the building was not finished till this work was done, the claim was filed in time. The determination of the Supreme Court confirmed the opinion of the late Judge McKean, on this part of the case. I will read it to you. [His Honour here read Judge McKean's charge, from 12 Serg. & Rawle, 302.]

"If you shall be of opinion upon the facts, that the claim was filed in time, viz.: within six months after the building was finished, then, secondly, has the claim, or any part of it, been paid, or in any way satisfied, as respects the defendant?

"The defendant's counsel contend that an agreement existed between the plaintiffs and Harker and Thorn, by which Harker and Thorn were to receive notes of the plaintiffs, or orders from Moses Lancaster upon them, payable in lumber; which notes or orders the plaintiffs were to credit to this house: That such notes or orders were received by Harker and Thorn, but, contrary to the original agreement, appropriated to other accounts. Such an agreement, if it ever existed, was within the control of the parties, unless the rights of third persons intervened; there is, however, not one tittle of evidence, that any such agreement ever did exist. But, if the defendant has failed in proving the agreement, he nevertheless contends that he is entitled to a credit of one hundred dollars, the amount of the note of the 12th March, 1818. This note was virtually an accepted order drawn by Moses Lancaster, in favour of the holder, upon the plaintiffs. If Harker and Thorn had presented this note for payment, they would have been entitled to the amount in lumber; if they did not choose to present it, but preferred obtaining the lumber on their own credit, they might do so. Their possession of the note, or order, without the knowledge of the plaintiffs, was not payment, whether they would or not, of the

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lumber so purchased. The law is, that though Harker and Thorn were in possession of this note, or order, during the whole time that the lumber in question was purchased and delivered, they might, nevertheless, have afterwards presented it, and received lumber in payment of it, without affecting the plaintiff's lien for the lumber in question. If you find the fact to be, that the plaintiffs did not know, at the time of furnishing the lumber, that the note or order of the 12th March, 1818, for one hundred dollars, had been transferred to Harker and Thorn, and also, that the lumber was not furnished on the credit of the note or order, and in payment of it, but exclusively upon the credit of Harker and Thorn, then the note or order was not paid by the lumber so furnished, and the plaintiffs were not obliged, when they afterwards learned that Harker and Thorn had, during this [*320] time, been the owners of the note, to *pass it to the credit of this account, but might pay it in other lumber, or pass it to the credit of different and subsequent accounts.

"The defendant has requested the charge of the court on four points of law.

"1. That the note of 12th March, 1818, signed by Conrad and Lancaster, in favour of Moses Lancaster, for one hundred dollars, payable in lumber, delivered 11th July, 1818, to Harker and Thorn, was not a negotiable note.

"To this I answer, that it is not a negotiable note; but a *bona fide* holder having the rightful possession, might sue the plaintiffs in a special action, or in the name of Moses Lancaster, and the right would pass by transfer from hand to hand. This, however, is not material; it is no part of the case. It is an answer to the question to say, that it is not strictly, and in a legal sense, a negotiable note.

"2. Not being a negotiable note, it remained the property of Harker and Thorn up to the 15th of May, 1819, when H. Hopkins purchased, notwithstanding its being mislaid by Harker and Thorn.

"Ans. I put the case, that the note remained in their possession, or undisposed of by them, and answer affirmatively, Yes.

"3. As H. Hopkins purchased on the 15th of May, 1819, and no transfer or change of appropriation of this order, was made by Harker and Thorn before that time, they could make none afterwards; if it was a payment before that time to its amount, as between Conrad and Lancaster, and Harker and Thorn, it so remains.

"To this I answer, you are to understand distinctly that though Harker and Thorn had the note in their possession, and were the owners of it, at the time they purchased the lumber, if they did not present the note to the plaintiffs, and obtain the

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lumber upon it, but the plaintiffs, being ignorant of the fact, furnished the lumber upon the credit of Harker and Thorn, then the plaintiffs' lien is in no way affected by the circumstance of the note, and it was no payment.

"4. That, if the shelving of the vault was not a part of the original plan of the building, but was directed to be put therein, one or two months after the building was finished, then the plaintiffs, by furnishing the lumber for that purpose, are not, by law, thereby entitled to a lien for all the lumber previously furnished, in erecting and constructing the building.

"*Ans.* To this I answer, no lien attaches for additions or repairs: this belongs to the first question in the case, and the law I have read from *Serg. & Rawle*."

The following errors were assigned in this court:—

"1. The judge erred in rejecting the evidence of Abia B. Thorn.

"2. The judge erred in the charge given to the jury, viz.: *First.* In referring it to the jury as a matter of fact, whether the house was finished, until shelves were put in the vault. *Second.* In the answer he gave to the third question, viz.: 'You are to understand distinctly that, though Harker and Thorn had the note in their *possession, and were the owners of it, at the time they purchased the lumber, if they did not pre- [*321] sent the note to the plaintiffs and obtain the lumber upon it, but the plaintiffs being ignorant of the fact, furnished the lumber upon the credit of Harker and Thorn, then the plaintiff's lien is in no way affected by the circumstance of the note, and it was no payment.'

"3. In the answer he gave to the fourth question, viz.: 'To this I answer—No lien attaches for additions or repairs, this belongs to the first question in the cause, and the law I have read from *Serg. & Rawle*.'"

H. Hopkins and *T. Sergeant*, for the plaintiff in error:—

1. The rejection of Thorn, as a witness, was erroneous. He was not a party to the suit; was not served with process; did not plead, and the jury were sworn to try the issue between Conrad and Lancaster, and Hopkins alone. The *scire facias*, it is true, issued against Harker and Thorn and terre tenants, but was only served on Hopkins, the terre tenant, who derived title under Thorn. He was not interested, because he stood indifferent between the parties, being equally liable to each. To the defendant, he was liable on his warranty, in case of recovery by the plaintiffs; and to the plaintiffs he was liable on his contract, in the event of a failure to recover in this suit. The witness received no notice from the defendant to come in

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and defend, and no man is liable for the costs of a suit, which he has no notice to come in and defend. The verdict would not be evidence against Thorn. The warranty is the usual covenant of special warranty. In *Hamilton v. Cutts*, 4 Mass. Rep. 353, it is said, that a recovery, with notice, is conclusive evidence against the covenantor. If Thorn had received notice, he might have chosen to pay the money. In *Twamley v. Henry*, ib. 441, it was held that the judgment in that suit could not be given in evidence against the warrantor, he being liable, whether a recovery took place or not. The possibility of being liable for costs, does not make a witness incompetent. *Phill. Ev.* 54, 55.

In covenant on a warranty, the measure of damages is not the loss actually sustained, but only the principal and interest of the debt. *Bender v. Fromberger*, 4 Dall. 436. Where an ejectment is brought against the vendee of lands, if notice be given to the warrantor, the record is conclusive evidence against him, in an action of covenant on the warranty. But, if the vendee omits to give notice, but appears and defends, he cannot recover his expenses, for he cannot subject his warrantor to more than he is liable for, on his covenant. *Fulweiler v. Baugher*, 15 Serg. & Rawle, 55.

2. On the 26th of February, 1820, when the arrangement was made by Conrad and Lancaster, Harker and Thorn, and Moses Lancaster, the plaintiffs, might have had a lien on the Fourth Street houses, if they had chosen to file their claim. They could have sustained no loss by passing the note to the credit of the Walnut Street house. This they were bound to do, because, otherwise, the *loss would be thrown on an [*322] innocent purchaser, without notice. Instead of this, they apply this debt, as it then existed, to the Fourth Street house; suffer their lien upon it to expire, and then, in November, 1820, sue out this *scire facias* against Hopkins. It is nothing that the lumber was not furnished on the credit of this note, nor that, until February, 1820, the plaintiffs did not know that it was in the hands of Harker and Thorn. Harker and Thorn knew all about it in July, 1820. In February, 1820, the plaintiff knew of it, and did not pass it to any other account, to the injury of the defendant. The note was not negotiable. Though lost, it was in the hands of Harker and Thorn in payment of the plaintiffs' claim; the lumber for which it called having been received by Harker and Thorn, to the amount of one hundred dollars, in July, 1818. Mutual demands, subsisting at the same time, distinguish each other by operation of law, without actual defalcation by the parties. *Commonwealth v. Clarkson*, 1 Rawle, 291. As between themselves, parties may undoubtedly waive, or alter such discharge;

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but they cannot do so to the injury of a third person. To do as was done in this case, was a fraud upon the defendant. *Harker v. Conrad*, 12 Serg. & Rawle, 301, is in point as to the principle which governs this case.

Dwight and *Bradford*, for the defendants in error, who were directed by the court to confine their argument to the last point, said, that the plaintiffs below had furnished lumber for two sets of buildings, one in Walnut Street, the other in Fourth Street. The latter were begun in April, 1819, and finished in March, 1820. Moses Lancaster sold to Conrad and Lancaster a fifth house, to be paid for in orders. The plaintiffs below had no knowledge of *Harker* and *Thorn* having the order in question, until seven months after the claim was filed. The note was then transferred by delivery.

That the question of appropriation of money may arise, there must be actual payment. It can arise in no other case than payment in fact: it cannot arise on an exchange or barter. *Ingraham v. Hall*, 11 Serg. & Rawle, 83; *United States v. Kirkpatrick*, 9 Wheat. 737. There must be two debts due from the debtor to the creditor, 11 Serg. & Rawle, 83. The debtor must intend an appropriation when the order is given. At what time the order in question was an actual payment, there is nothing to show. *Harker* and *Thorn*, for two years, intended it as a payment. Will the court regard it as a payment at any particular moment of that period, when they do not know where it now is, or whether or not it is lost? An appropriation, to be valid, must be compulsory and binding on both parties, which was not the case here, as *Harker* and *Thorn* had a right to transfer the order to whom they pleased.

Nor does a question of set-off arise in this case. The pleas are merely *non assumpsit* and payment. A set-off can only take place between debtor and creditor, and not between the creditor and a third person. The act of assembly [*323] speaks of mutual indebtedness.

Mr. Hopkins was not a purchaser without notice. There was enough to put him on inquiry, and he took care to guard himself by a warranty.

The opinion of the court was delivered by

HUSTON, J.—In order to understand this cause, and the reasons of our opinion, we must attend to dates as well as facts. *Harker* and *Thorn* were erecting a house in Walnut Street in the year 1818. They got lumber from *Conrad* and *Lancaster* for this house, and the first charge is on the 23d of June, 1818. On the 11th of July, 1818, the price of the lumber delivered

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was less than one hundred dollars. On the 11th of July, 1818, Moses Lancaster assigned to Harker and Thorn a note, signed by Conrad and Lancaster, and dated the 18th of March, 1818, for one hundred dollars, payable in lumber. On this day, then, Harker and Thorn were the creditors, and Conrad and Lancaster were indebted to them; but Conrad and Lancaster continued to deliver more lumber, and soon became creditors. The house was finished about the last of December; or, as the jury have found, though I cannot see why, some time in January, 1819.

On July 1st, 1819, Conrad and Lancaster filed in the office of the District Court a claim for three hundred and thirty-four dollars and forty-four cents against Harker and Thorn for lumber furnished this house in Walnut Street; and the dispute arose on the trial of an issue on the validity and amount of this mechanic's lien. The plaintiffs proved the delivery of the lumber, and there was contradictory proof about the time when the house was finished.

The defendant showed a title in Abia B. Thorn, and a deed from him to H. Hopkins, dated the 15th of May, 1819, and a deed from H. Hopkins to J. R. Hopkins, dated the 21st of June, 1819; and then proved by Moses Lancaster that he transferred to Harker and Thorn the note for one hundred dollars, payable in lumber, above mentioned, on the 11th of July, 1818; and that about a year afterwards (that is, after the purchase of the defendant, and the filing of the claim for a lien,) he was informed by Harker and Thorn that the note was lost; and an arrangement was made by Conrad and Lancaster, Harker and Thorn, and himself, that the note for one hundred dollars which was lost should be replaced, and an order should be given by Moses Lancaster on Conrad and Lancaster, as if the first note had been presented. This arrangement was made and the order given the 26th of February, 1820. Conrad and Lancaster, he says, knew nothing about these orders, so far as he knew, before that time. On the same day he gave Harker and Thorn another order on Conrad and Lancaster for one hundred and thirty-seven dollars and twenty-six cents, being a balance he owed Harker and Thorn. He afterwards says, Conrad and Lancaster *knew of every arrangement with Harker and Thorn, but he does not know when they became acquainted with it; he never heard them speak of being paid for the lumber for the Walnut Street house by these orders, or of transferring them to the house in Fourth Street.

Harker and Thorn built another house in Fourth Street, and got lumber for it from Conrad and Lancaster. Against this last house they filed no claim of lien. The first article of lum-

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ber for it was furnished the 24th of April, 1819, and several months after the first house was finished. Conrad and Lancaster wished to give credit for these two orders of M. Lancaster on the Fourth Street house. Hopkins alleged he was entitled to credit for one or both of them on the house in Walnut Street. This cause was tried before, and is reported in 12 Serg. & Rawle, 301; but the point in dispute, or rather the sum, was different; that related to a payment of five hundred dollars; this to the two orders of M. Lancaster. I refer to that case, for the general law, as to what debt, a payment made, and not appropriated at the time, shall be applied; and adopt the principle there stated as applicable to this matter, but much more strongly to these facts.

This cause has been ingeniously and well argued, except that the counsel of Conrad and Lancaster have relied on the British statutes of set-off, and not on our act about defalcations, which goes much further than the British statutes; a matter which every lawyer ought to keep constantly in view, and which the court generally recollect. There can be no question as to what debt a payment or a counter demand shall be applied to, unless the party has two demands payable at different times, or secured by different instruments; or of which one, at least, is a lien on some fund, which another part of the debt does not bind.

On July 11th, 1818, Conrad and Lancaster had but one demand, and that for lumber furnished to the Walnut Street house; it could become a lien on that house, but on no other property under the act creating a mechanic's lien. On that day Harker and Thorn became owners of a note payable in lumber by Conrad and Lancaster exceeding the price of lumber then furnished. The note was honestly due; admitted now to be due. The operation and effect of this state of things were, that Conrad and Lancaster could not by suit recover the price of the lumber furnished; nor could they transfer to any other person a right to recover it. Harker and Thorn could not recover on their note, except the balance; nor could they transfer to any other person a right to recover it. It was not a negotiable note; it was, to be sure, transferable, but would be subject, in the hands of a third person to defalcation, to the amount of the claim of Conrad and Lancaster for lumber furnished; for, in Pennsylvania, where two persons have each, in their own right, whether strictly a legal or only an equitable right, demands against each other, due at the time, neither can transfer to a third person a *right to recover more than the balance, [*325] unless the demand on one of them is a negotiable note, and that note not over due. This is so by express act of assembly, and decisions in every book of our reports; and it does

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not make the slightest difference that the party transferring and he to whom it was transferred did not know of the fact that there existed a cross demand. It is so as to bonds; so as to notes, except those strictly negotiable; so as to book accounts; so in case of the insolvency of one of the parties, or in case of the death of the creditor party insolvent; his executors can recover only the balance. *Murray v. Williamson*, 3 Binn. 135.

This note then paid or extinguished its own amount of the price of the lumber furnished to the Walnut Street house; and the lumber furnished to the Walnut Street house extinguished this note long before any debt was contracted for the house in Fourth Street. The parties were both bound by the law; by consent of both they could change this; neither could change it without the consent of the other. They did, however, both consent to change it; but it was after the right of J. R. Hopkins had come in, and then it could not be changed for the reasons given at the former trial of this cause: it was illegal and unjust towards a third person; it was intended to relieve Harker and Thorn, and secure Conrad and Lancaster, by considering a note of the latter to the former unpaid, and transferring the credit for it to another fund, at the expense of a purchaser for a full and valuable consideration.

Let it be distinctly understood that I do not say this note for the one hundred dollars, payable in sawed timber, was a good defence to every demand of every kind which Conrad and Lancaster might have against the holder of the note; but it was a good defence to a demand by them for the price of the sawed timber furnished to those who held the note. Our act about defalcation is the first legislative provision giving chancery powers to the common law courts. It was intended to give the common law courts all the power which chancery had ever exercised over bond and other debts; to put an end to what had been said, that a demand was good at law, but would be relieved against in equity, and to do all at the trial of the cause, which a chancellor had been used to do afterwards; and it was intended to do, and has done more; it has prevented cross actions, wherever one will effect the ends of justice better. It is a most beneficial law, and has never been complained of, except by those who think nothing good can be done on this side of the great water.

As to the other order, for the one hundred and thirty-seven dollars and twenty-six cents, we have not enough before us to give an opinion, further than that it must be decided on the principles laid down by this court on the former hearing, and this. In a cause like this, where a paper is lost or found, or perhaps, made at different trials, as may best tend to suit the interests of

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two parties who wish to affect *a third party, we cannot conjecture what shape it would assume next time. [*326]

Abia B. Thorn was not a witness; he was directly bound by his warranty. This verdict and judgment would be evidence in the suit against him, for one purpose, if he had no notice; conclusive, if he had notice; and I do not see how a man, who was examined as a witness in a cause, could deny that he had notice, or what better proof of notice could be given.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 5 Wh. 264, 458; 9 W. 180; 6 H. 242; 8 C. 488; 1 W. N. C. 629.

Cited by the Court, and overruled on the point that mutual demands cancel each other, 8 W. 44. See also 8 W. 260, 406; 26 S. 464.

[PHILADELPHIA, JANUARY 19, 1830.]

Paul and Another, Executors of Paul, *against* Shallcross and Another.

IN ERROR.

If property be sold at public sale, on certain terms, one of which is, that on non-compliance with those terms, the property shall be resold at the risk and expense of the purchaser, the second sale must not be clogged with terms likely to lower the price.

Query, Whether to make it a part of the conditions of the second sale that the balance remaining unpaid shall be secured by bond with warrant of attorney and mortgage, when the conditions of the first were, that it should be secured by bond and mortgage only, is not such an essential variance as will discharge the purchaser.

If the seller and the person to whom the property was struck off at the first sale, enter into an agreement, before the second sale takes place, that the latter shall take the property at the price he before bid for it, but the agreement contains terms, in other respects, essentially different from those of the first contract, he cannot, on failing to comply with the second contract, be made answerable on the first.

THIS case came before the court on a writ of error to the District Court for the city and county of *Philadelphia*, where it was an action on the case, brought by the plaintiffs in error, Joseph Paul and Jonathan Wainwright, executors of Thomas Paul, deceased, against John Shallcross and Joseph Wilson, the defendants in error, to recover damages for the breach of a written agreement, dated the 17th of February, 1824, for the sale by the plaintiffs to the defendants of certain real estate.

The cause was tried, and the jury found the following special verdict:

“The jury find that the property was sold on the 17th day of

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February, 1824, by the plaintiffs to the defendants, by virtue of the following agreement :—

“Pursuant to the last will and testament of Thomas Paul, deceased, will be sold at public vendue, on Tuesday, the 17th of [327] February, *1824, at 1 o'clock, P. M., on the premises, three lots of land, with their appurtenances, situate in Lower Dublin township, Philadelphia county, and village of Bustleton, on the turnpike road, eleven miles from Philadelphia.

“Lot, No. 1 : Whereon is erected a large stone and frame tavern house, stone stabling and frame sheds, two wells of good water, one of which has a pump in it.

“Conditions made known at the time of sale, by

“JOSEPH PAUL,
“JONATHAN WAINWRIGHT, } Executors.

“Feb. 2d, 1824.

“The conditions of sale of the real estate of Thomas Paul, deceased, are, one-half of the purchase-money to be paid on the 1st day of April next, the remainder to be paid on the 1st day of April, 1825, with interest, to be secured by bond and mortgage on the premises. If the purchaser fails to comply with the conditions of sale, the property will be sold again at the risk of the purchaser.

Signed, “JOSEPH PAUL,
“JONATHAN WAINWRIGHT, } Executors.

“Bustleton, Feb. 17th, 1824.

“Lot No. 1. Seventeen hundred and fifty dollars.

Signed, “JOSEPH WILSON,
“JOHN SHALLCROSS.

“That the defendants failed to comply with their agreement, and on the 13th of May, 1824, the plaintiffs tendered to the defendants a deed duly executed for the property, and a bond and mortgage to be by them executed; but the defendants would not execute them, nor did they pay any part of the purchase-money.

“That the property was readvertised for sale upon the 14th day of June, 1824, on account of the default of the former purchasers, and at their risk and expense: that on the said 14th day of June, 1824, previously to such resale, the defendants entered into the following agreement, viz. :—

“Will be sold at public vendue, on Monday the 14th of June, 1824, at two o'clock, P. M., on the premises, a tavern house and

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lot of land, with the appurtenances, situate in the village of Bustleton, in Lower Dublin township, Philadelphia county, on the turnpike road, eleven miles from Philadelphia. The tavern house is large, part of stone and part of frame, with stone stabling and frame sheds, two wells of good water, one of which has a pump in it.

“N. B.—The above property is to be sold on account of the default of the former purchasers, and at their risk and expense; conditions made known at the time of sale, by

“JOSEPH PAUL,	} Executors to the Estate of
“JONATHAN WAINWRIGHT,	
“May 27th, 1824.”	

“*Conditions of sale.—One-half cash on the 1st day of July; the balance in twelve months from this date, with [*328] interest, and to be secured by a bond and warrant of attorney, and a mortgage on the premises. If the purchaser fails to comply with the conditions of sale, the property may be sold again at the risk and expense of the purchaser.

“June 14th, 1824.”

“John Shallcross and Joseph Wilson, agree with the executors as follows:—That they will take the above-named property at their former purchase of one thousand seven hundred and fifty dollars; six hundred dollars to be paid on the first day of August, upon which the deed is to be executed, and the balance to be secured by a bond and warrant of attorney, and mortgage on the premises, payable in one year, with interest: That the property shall be immediately insured in some insurance office in Philadelphia, at the expense of the said Shallcross and Wilson, and the policy deposited with the executors; and that one hundred dollars shall, within two weeks, be deposited in the hands of the executors, which one hundred dollars shall be forfeited in case these terms are not complied with. The expenses occasioned by their non-compliance, to be paid by the said Shallcross and Wilson.

“JOHN SHALLCROSS,
“JOSEPH WILSON.

“June 14th, 1824.”

“At the same time, John Northrop entered security for the performance of the defendants, as follows, viz.:

“I engage that the above one hundred dollars shall be deposited within two weeks from this day.

Signed, “JOHN NORTHROP.

“June 14th, 1824.”

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"In consequence of the said agreement, the contemplated sale did not take place. The plaintiffs tendered the defendants no deed or other paper, relating to the sale of the 14th of June.

"The defendants did not pay or deposit the one hundred dollars, nor insure the property, nor pay, or secure the purchase-money, nor any part thereof; nor did John Northrop comply in any respect with his engagement. The plaintiffs instituted a suit against Northrop to September Term, 1824, No. 456, and obtained judgment, but issued no execution.

"The plaintiffs advertised the property for sale on the 9th day of December, 1824, on account of the default of the former purchasers, and at their risk and expense, and sold it to John Dickinson for one thousand three hundred dollars. The expenses of the re-sale amounted to sixty-six dollars and ninety-two cents. The plaintiffs filed a paper, stating that they had always considered the judgment against Northrop as a security for so much, and agreeing to *release the same upon the payment of four hundred and fifty dollars, with interest and costs of suit. The jury find for the plaintiffs four hundred and fifty dollars, if the court should be of opinion, that in point of law upon the above facts, they could recover that amount; and if not, for the plaintiffs one hundred and sixty-six dollars and ninety-two cents."

The court entered judgment for one hundred and sixty-six dollars and ninety-two cents, upon which the plaintiffs took out a writ of error, and assigned for error, that the court gave judgment for the plaintiffs for one hundred and sixty-six dollars and ninety-two cents, when they ought to have given judgment for the plaintiffs for four hundred and fifty dollars.

P. A. Browne, for the plaintiffs in error, made the following points:—

1. On the 13th of May, 1824, the plaintiffs' right of action for a breach of the agreement of the 17th of February, was complete.

2. The sale intended to have taken place on the 14th of June, was only to ascertain the amount of damages.

3. That the sale was prevented by the defendants, who came forward and confirmed their purchase, but claimed, and obtained an extension of time for payment.

4. All the acts under the agreement of the 14th of June, were to have been done by the defendants, and they were all omitted to be done by them, and consequently,

5. The plaintiffs had a right to recur back to their original agreement of the 17th of February.

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6. The sale of the 9th of December, was only to ascertain the damages.

7. No tender of a deed was necessary.

8. The notice to one defendant was sufficient, as the two acted jointly.

9. The suit and judgment against Northrop were only to enforce the deposit.

Davis and *J. S. Smith*, for the defendants in error, contended, that the first and second contracts were inconsistent with each other; the latter contains a penalty, in the nature of stipulated damages, to be paid on failure to comply with its terms. If, therefore, the first agreement was not only absolutely rescinded by the second, the plaintiffs, by pursuing Northrop, the security, had elected to go upon the second, and could not now proceed upon the first. Co. Litt. 146, a; *Patterson v. Swan*, 9 Serg. & Rawle, 16. At all events, the plaintiffs were bound to tender a second deed, before bringing action.

The opinion of the court was delivered by

HUSTON, J.—This was a judgment on a special verdict. On the 17th of February, 1824, certain property was sold in pursuance of an advertisement by the plaintiffs as executors. The advertisement *stated, that the conditions of sale would be made known at the time of the sale. They were as [*330] follows :—

“The conditions of the sale of the real estate of Thomas Paul, deceased, are one-half of the purchase-money to be paid on the first day of April next; the remainder to be paid on the 1st day of April, 1825, with interest, to be secured by bond and mortgage on the premises. If the purchaser fails to comply with the conditions of sale, the property to be sold again at the risk of the purchaser.” Signed by the plaintiffs. Dated, Bustleton, 17th of February, 1824.

Under this was written, “Lot No. 1, seventeen hundred and fifty dollars;” and this was signed by the defendants.

The defendants failed to comply with this agreement; and on the 13th of May, 1824, the plaintiffs tendered to the defendants a deed, duly executed, for the property, and a bond and mortgage to be executed by the defendants, who did not execute the said bond or mortgage, or pay any part of the purchase-money.

The plaintiffs again advertised the property for sale on the 14th of June, 1824, describing lot No. 1, as in the former advertisement, with this addition: “N. B. The above property is to be sold on account of the default of the former purchasers,

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and at their risk and expense; conditions made known at the time of the sale," and signed by the plaintiffs. Dated the 27th of May, 1824.

On the day of the sale the following conditions were put up:—

"Conditions of sale.—One-half cash on the 1st day of July, the balance in twelve months from the date, with interest, and to be secured by a bond and warrant of attorney, and a mortgage on the premises. If the purchaser fails to comply with the conditions of sale, the property may be sold again at the risk and expense of the purchaser."

There was no sale by public vendue, but on the 14th of June, the day of sale, a paper, in the following words, was drawn and executed.

"John Shallcross and Joseph Wilson agree with the executors as follows: That they will take the above-named property at their former purchase of one thousand seven hundred and fifty dollars; six hundred dollars to be paid on the first of August, upon which the deed is to be executed, and the balance to be secured by a bond and a warrant of attorney, and mortgage on the premises, payable in one year with interest: That the property shall be immediately insured in some insurance office in Philadelphia, at the expense of the said Shallcross and Wilson, and the policy deposited with the executors; and that one hundred dollars shall, within two weeks, be deposited in the hands of the executors, which one hundred dollars shall be forfeited in case these terms are not complied with; the expenses occasioned by their non-compliance to be paid by the said Shallcross and Wilson." Signed by both defendants. June 14th, 1824.

[*331] *Immediately below was written:—"I engage that the above one hundred dollars shall be deposited within two weeks from this day.

Signed,

"JOHN NORTHROP.

"June 14th, 1824."

I have said, no public sale took place. The plaintiffs tendered to the defendants no deed or other writing, relating to the sale of the 14th of June. The defendants did not deposit the one hundred dollars, nor insure the property, nor pay any money, nor offer to pay any. John Northrop did not pay the one hundred dollars, but was sued, and judgment recovered against him for that sum, in suit No. 456, to September Term, 1824.

The plaintiffs advertised the property for sale on the 9th of December, 1824, on account of the default of the former purchasers, and at their risk and expense, and sold it to John Dick-

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inson for one thousand three hundred dollars. The expenses of the resale were sixty-six dollars and ninety-two cents. The jury found a verdict for the plaintiffs for four hundred and fifty dollars, if the court should be of opinion, in point of law on the above facts, that they could recover that sum; if not, for the plaintiffs for one hundred and sixty-six dollars and ninety-two cents. The court entered judgment for this latter sum.

The plaintiffs stated, and filed in writing, that they had always considered the judgment against Northrop, as a security for so much, and agreeing to release the same on the payment of four hundred and fifty dollars, with interest and costs of suit. The plaintiffs brought this writ of error, and assigned for error, that judgment ought to have been entered for the larger sum. The plaintiffs' counsel contended, that it was legal to advertise on these terms: That on failing to comply with the terms, the difference should be paid by the bidder: That the purchasers having agreed to this, the difference between the first and the last sale, were stipulated damages: That the second agreement was not a relinquishment of this part of the conditions of the first sale: That the change of the terms was only to make it conform, as far as possible, to the terms of the first; and that the conduct of the defendants showed, their last agreement was only a fraud on the plaintiffs.

There was a time, when the penalty in a bond, or article of agreement, was said to be stipulated damages, and was so at law. Chancery courts, and chancery powers were for a long time founded on, and supported by the necessity of relieving from this. I do not say, that any agreement, or any device, or form of sale, or of contract, does or can exist, which in any well regulated government, will have the effect, in all cases, here contended for. If a bond, an article of agreement under seal, or a mortgage, all of which once had this effect, and all of which are as positive in their terms as language can be, and are as solemn instruments as men can execute, have not this effect, and experience has proved the absolute *necessity of relief [332] from their terms, and they now only produce justice according to the facts and circumstances of the case; it is not easy to give a good reason why less solemn instruments, or parol contracts, should be, in law, different; but it is not necessary to decide the matter in this case. If this condition could be binding, the second sale must not be clogged with any terms likely to lower the price; and I am not prepared to say, that the clause in the conditions of the second sale, that the balance should be secured by a bond, and a warrant of attorney, and mortgage, which must mean a warrant of attorney to confess

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judgment, was not an essential variance of the terms of sale likely to deter bidders, to lessen the price; but I do not go on that either. The agreement of the 14th of June, was a private, not a public sale. Its terms are as plain as words can make them, and except, as to price, are in all respects different from those of the first sale, and from those set up as the terms of the second public sale. The sums payable, and times of payment, are different; the insurance of the property is different; no resale is mentioned, but an absolute forfeiture is agreed on, and security is required and given: in short, it was an entirely new and distinct contract. The words, "agree to take the property at their former purchase, of one thousand seven hundred and fifty dollars," are not the contract, but part of the contract, modified by every word which follows.

We cannot, in this case, consider this second contract as a fraud, for it is not so found in the special verdict; and the facts do not warrant the inference, if we could draw one of that kind.

Every contract may be waived, or varied by the parties to it. When a first contract is declared by a party to be at an end, as the first sale was here by the second advertisement, the parties may still come to another agreement. When the new agreement is in itself complete, contains precise stipulations as to what shall be the effect, on certain contingencies, and these effects are to be different from what was stipulated by the contract which had been declared void, I know of no rule of law, or reason, which will justify a court in saying, that all the terms of the first agreement are still in force, and that the latter agreement is only cumulative. If this were said, nothing could be so unsafe as to enter into new articles with one who had before contracted. Why was not the first agreement complied with? Who refused to complete it? The defendants. Why did they make a new agreement? To get different and better terms. But if the plaintiffs' construction is adopted, this can never be. I am of opinion, the second was an entirely new agreement: That the defendants are bound by it, and not by the first, and that the judgment of the District Court was right.

Judgment affirmed.

Cited by Counsel, 4 O. 512, s. c. 12 W. N. C. 431.

Cited by the Court, 9 Barr, 427; 27 S. 204.

Followed 27 S. 392, s. c. 1 W. N. C. 217, where it was held that requiring five hundred dollars hand-money at the second sale when but fifty dollars hand-money was required at the first was such a change of conditions as released the first purchaser.

*[PHILADELPHIA, JANUARY 19, 1830.]

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Harlan *against* Stewart, Administrator of Stewart.

IN ERROR.

A rule to take the depositions of ancient, infirm, and going witnesses, may be granted, after an appeal has been taken from the decision of a justice of the peace, but before a transcript of his judgment has been filed in the Court of Common Pleas.

ON a writ of error to the Court of Common Pleas of *Philadelphia* county, it appeared that this action was originally brought before Justice Loughhead, by David Stewart against Charles Harlan, to recover the sum of thirty-five dollars. On the 22d March, 1826, the justice gave judgment for the plaintiff; on the 29th of the same month, the defendant appealed, and entered into the recognisance required by law. On the 30th of the following May, he filed a transcript of the judgment of the justice in the office of the prothonotary of the Court of Common Pleas. Prior to the filing of the transcript, viz., on the 19th of April, 1826, on motion of the plaintiff's attorney, and affidavit of special circumstances filed, the court granted a rule to take the depositions of ancient, infirm, and going witnesses, on twenty-four hours' notice. Due notice was given to defendant, that the deposition of Freeman Latimer, a witness for the plaintiff, would be taken before alderman Badger, on the 25th April, 1826, and at the appointed time, the deposition was taken by the plaintiff, *ex parte*, the defendant not attending.

On the trial in the Court of Common Pleas, the plaintiff, after having proved that a subpoena had issued for the witness, and that he was unable to attend, in consequence of illness, offered in evidence his deposition, taken before alderman Badger, as above mentioned. The defendant's counsel objected to its being read: but the court overruled the objection, and admitted the deposition, which was the error now assigned.

Hopkins, for the plaintiff in error, referred to the act of the 20th of March, 1810, sect. 4, *Purd. Dig.* 452; *Stotesbury v. Covenhoven*, 1 *Dall.* 164.

Brewster, contra, was stopped by the court.

The opinion of the court was delivered by
HUSTON, J.—On the 22d of March, 1826, Justice Lough-

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head gave judgment for Stewart against Harlan, the defendant below. On the 29th of March, the defendant appealed to the Common Pleas, and gave bail according to law, but did not file the appeal in the Common Pleas until 30th May, 1826, being the first day of the term next after the appeal.

On the 19th of April, the plaintiff carried a certified copy of the judgment of the justice, and of the appeal taken, into the [*334] Court of *Common Pleas, and an affidavit stating that a material witness was about to leave the state. A special rule to take depositions was granted: notice of taking the depositions was duly given, and the deposition regularly taken.

At the trial of the cause, the witness had returned to this country, and had been duly summoned to attend the trial, but, on proof that he was confined to bed by sickness, the deposition was offered, and received by the court.

Among the earliest of our reports, 1 Dall. 164, we find, under similar circumstances, a rule granted to take the deposition of a witness before the return of the writ. And again, in the same book, p. 251, this is recognised. If such were not the practice in a seaport, intolerable hardship and loss would be the consequence. By the fourth section of the act of 20th March, 1810, appeals are to be, in court, subject to the same rules as other actions. There is no good reason why we should disturb a practice of so long standing in that court. There is no error in the admission of this deposition on the facts stated.

Judgment affirmed.

[PHILADELPHIA, JANUARY 25, 1830.]

Beidman and Others *against* Vanderslice and Others.

IN ERROR.

In *assumpsit* or other action upon contract against several defendants, the plaintiff cannot enter a *nolle prosequi*, as to one, unless it be for some matter which may be pleaded as a personal discharge. Thus, if a *feme covert* be one of the defendants, a *nolle prosequi* may be entered as to her.

If an appeal from an award of arbitrators be made without the affidavit required by law, the irregularity is waived by the opposite party taking the costs out of court.

ON a writ of error to the Court of Common Pleas of Philadelphia county, the facts appeared to be these:—

On the 1st of December, 1827, an action was commenced before Isaac Boileau, Esq., a justice of the peace, by Andrew Vanderslice and others, the defendants in error, against Cathe:

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rine Beidman and Michael Faunce, and Elizabeth his wife, the plaintiffs in error, "on a plea of debt or demand arising on contract." The claim was for goods sold and delivered. On the 26th of December, 1827, judgment was rendered for the plaintiffs, from which the defendants appealed to the Court of Common Pleas, to March Term, 1828. On the 18th of April, 1828, the plaintiffs entered a *nolle prosequi*, as to Elizabeth Faunce, one of the defendants; and on the 11th of the following November took out a rule of arbitration. On the 3d of December, 1828, the arbitrators made an award in favour [*335] of the plaintiffs, from which one of the defendants, on the 18th of the same month, appealed, paid the costs, and entered into the proper recognisance; but filed no affidavit as required by law.

On the 20th of December, 1828, the plaintiffs obtained a rule on the defendants to show cause why the costs paid in on the appeal, should not be taken out of court; and on the 27th of the same month, they took the costs out of court. No further proceedings were had until the 12th of January, 1829, when the plaintiffs applied to the court for a rule to show cause "why the defendant's appeal should not be dismissed for the want of an affidavit, on appealing." This rule the court made absolute, and ordered the appeal to be dismissed.

In these proceedings two errors were assigned:—

1. That the entry of a *nolle prosequi*, as to one of the defendants, vitiated the proceedings, and the action and judgment could not be sustained.

2. That the Court of Common Pleas erred in making absolute the rule to dismiss the appeal, because the plaintiffs had waived the irregularity by receiving the costs, and by delay.

Miles, for the plaintiffs in error, contended,—

1. That, although in actions of trespass against several, the plaintiff might enter a *nolle prosequi*, as to one, yet, in actions arising *ex contractu*, a *nolle prosequi*, as to one, discharged all; and cited 1 Peters' Rep. 46; 20 Johns. Rep. 126.

2. That the plaintiffs having applied for and received the costs, without any reservation of right, and having been guilty of unreasonable delay in applying to have the appeal dismissed, had waived the irregularity in taking the appeal. *Mayes v. Jacoby*, 8 Serg. & Rawle, 526.

Campbell, for the defendants in error, being desired by the court to confine himself to the last point, said, that, in fact, the money was not taken out of court, and it did not appear by the record that it was.

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SMITH, J., (after stating the facts and the errors assigned,) delivered the opinion of the court, as follows:—

As to the first error. It has been long settled, that a *nolle prosequi* does not amount to a *retraxit*, and that it may be entered as to a part of the suit, or as to one of the defendants, where the action is in its nature joint and several, or where the defendants sever in their pleas. Thus, in trespass, or other action founded upon tort, the plaintiff may enter it at any time before final judgment as to one or more of the defendants, and proceed against the others. In truth, it amounts only to an agreement not to proceed in the action against the particular person, and is entered against him for the purpose of obtaining substantial justice. The cases of *Pugsley's Executors v. Pell and Wife*, 20 Johns. Rep. 126, and of *Minor et al. v. The Mechanics' Bank*, 1 Peters' Rep. 74, are express *on this [336] point. But, in *assumpsit*, or other action upon contract against several defendants, the plaintiff cannot enter a *nolle prosequi*, as to one, unless it be for some matter which may be pleaded in his personal discharges; such as *ne unques executor*, or, in England, a certificate of bankruptcy; because the contract being joint, the plaintiff could do no otherwise than bring his action against all the parties; and he ought not, by entering a *nolle prosequi*, as to one, or more of the defendants, to prevent those against whom he might recover from calling upon the others for a rateable contribution. Besides, there would be manifest inconsistency in compelling the plaintiff to join all the parties to such a contract, in bringing his suit, and allowing him afterwards, in the progress of the cause, to sever them by a *nolle prosequi*.

The present action was founded on a joint contract; but one of the defendants was Elizabeth Faunce, a *feme covert*, who was not able to enter into a contract, and ought not, therefore, to have been joined. She was never under any responsibility, nor could she ever be called upon for contribution. The coverture was proper matter for a plea discharging her from the action, and, consequently, the *nolle prosequi*, as to her, was perfectly legal.

We are accordingly of opinion, that the first objection, assigned as error, is not sustained.

It is, however, important to consider, whether the second objection be sustainable or not, as informal or irregular appeals are of frequent occurrence. It is true, that in this case, the affidavit, requisite on entering an appeal was not filed or made, and, therefore, in this particular, the appeal was not in compliance with the act of assembly, which requires, that the party appealing, shall swear, or affirm, that "it is not for the purpose of delay such appeal is entered, but because such party firmly be-

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lieves injustice has been done ;” and I am not aware that this precise point has ever been, *in totidem verbis*, decided in this court. Yet, it has often been held, that irregularities and neglect of the preliminary requisitions of the law, in taking appeals, are cured by the acquiescence of the adverse party, or by acts which were considered as equivalent to a waiver of his objection. In *Mayer v. Jacoby*, 8 Serg. & Rawle, 526, it was remarked, that there was no difference between an appeal taken out of season (as was the case there) and an appeal taken without having paid costs, made the requisite affidavit, or given the proper security ; and any and all of these, may be waived. In that case, there was a delay of three years. In the case of *Cameron et al. v. Montgomery*, 13 Serg. & Rawle, 128, the delay was more than a year ; and in *Shank v. Warfel*, 14 Serg. & Rawle, 205, it was nearly two years. In each of these cases, it was considered, that the appellee came too late with his objection ; though in the first cited case, there were other circumstances from which, as well as the delay, the defendant’s acquiescence in the appeal was inferred, such as his pleading to the *narr.*, joining issue, and taking depositions *under [*337] rules entered for that purpose. The usual evidence of acquiescence and waiver, consists in an unreasonable delay to make the objection, or in proceeding with the action, as if no such objection existed. The plaintiff, having entered a rule of arbitration before the time for putting in special bail had arrived, has been held to have waived the special bail ; *Phillips v. Oliver*, 5 Serg. & Rawle, 419 : So where he filed a statement, appeared by his attorney, and pleaded his cause before the referees, he was considered as accepting the defendant’s appearance without bail ; *Maus v. Sitesinger*, 2 Serg. & Rawle, 421.

The act of the 20th of March, 1810, section 11, provides, that no appeal shall be allowed, until the appellant pay all the costs, which may have accrued on such suit or action. In the present case, the defendants paid the costs into the office of the prothonotary, on taking their appeal, but omitted to make the requisite affidavit. The plaintiffs apply for those costs, and take them out of court, and then, after all this, turn round, and ask the court to dismiss the appeal, because there is no affidavit. We think, that their receipt of the costs was as clear an indication of their intention to overlook the irregularity on which their motion was founded, as could have been exhibited. Had they purposed to insist upon the objection afterwards taken, they ought not to have touched them. We are accordingly of opinion, that the objection was waived by taking the costs, and that the appeal ought not to have been dismissed. The judgment of the

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Court of Common Pleas is therefore reversed, with directions to reinstate the appeal.

Judgment reversed.

Cited by Counsel, 3 Wh. 312; 3 Penn. R. 66; 2 Barr, 16, 101; 4 Wr. 93; 7 S. 317; 28 S. 368.

[PHILADELPHIA, JANUARY 25, 1830.]

Diehl *against* M'Glue.

IN ERROR.

After the jury has been sworn, the plaintiff may, under the act of 21st March, 1806, amend his declaration, so as to state his cause of action in a different manner, but not so as to introduce a new and different cause of action.

Therefore, when the plaintiff has counted for work and labour done, he cannot add a count, setting up a claim for not being employed by the defendant, agreeably to a special agreement.

WRIT of error to the District Court for the city and county of *Philadelphia*.

The defendant in error was plaintiff below.

After argument by *Keemle* for the plaintiff in error, and *Brewster* for the defendant in error, the opinion of the court, (in which the point decided is fully stated,) was delivered by

SMITH, J.—The declaration is in *assumpsit*, and contained, [*338] originally, *the following counts: 1. A count for goods sold and delivered, with a *quantum valebant*. 2. A count for work and labour done, with a *quantum meruit*. 3. A count for money had and received, and for money paid, laid out and expended. 4. A common count, with an *insimul computasent*. On the trial, after the jury were sworn, and after the plaintiff's case was opened and some testimony given, the counsel for the plaintiff offered in evidence the deposition of Benjamin Gidding, which was objected to by the defendant's counsel, as inadmissible, under the counts in the declaration filed, so far as it introduced another and a new cause of action; whereupon the counsel for the plaintiff offered to file an additional count, as an amendment to his declaration, for the purpose of giving evidence of the special matters contained in this deposition, to the filing of which the defendant objected, but the court admitted it, and the defendant excepted. The additional count was, in substance, this:—It set forth a special agreement, promise and undertaking, by the defendant, to find and furnish the plaintiff

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with constant and continual employment at coach or carriage-trimming, at the rate or price of twenty-five dollars for trimming gig-bodies, and at fifteen dollars for trimming volants, for such length of time as should be mutually agreed upon between the parties, and averred, that the said defendant did not furnish and provide the plaintiff with constant and continued employment, during all the time aforesaid; but neglected and refused so to do for the space of three months, and that he could have earned, during the said three months, five hundred dollars, if he had been found and furnished in constant employment, in the work aforesaid.

At common law, no such amendment would have been admitted, in this stage of the cause; and the only question is, was it admissible under the sixth section of our act of the 21st of March, 1806. The construction of that act has been frequently submitted to this court; it is clear, that amendments under it are not confined to mere alterations of form; but that they may extend to all informalities, which affect the merits of the cause before the court. There is, however, nothing in the act which authorizes the court to permit a plaintiff to introduce another and a new substantive cause of action; for, as the late Chief Justice Tilghman remarked, such alterations might become instruments of great injustice and oppression; nor will a plaintiff, under this act, be permitted so to amend his declaration, as to vary the nature of his claim. 4 Yeates, 365. If he could do so, the mischief would be immense, and a monstrous grievance. If it were allowed to a party, so to amend as to set out a new cause of action, a single suit might be a business for life, as was correctly said in *Newlin v. Palmer*, 11 Serg. & Rawle, 101. In the last case upon this subject, *Rodrigue v. Curcier*, 15 Serg. & Rawle, 83, it was declared, that in construing the act, the court endeavoured to carry its intention into fair effect, and that, where the object of the amendment was, not to forsake the matter for which *the action was truly and substantially [*339] brought, but to adhere to it, and effect a recovery on it, an amendment would be allowed; but not to enable the plaintiff to recover on causes of action, which he had not in contemplation when the suit was brought. I take the distinction to be, as established by this court, that the same cause of action may be variously stated, in different counts; but a new substantive cause of action cannot, on the trial, be introduced, in the shape of an amendment to the declaration. In the case before us, the plaintiff asked compensation for work and labour done, and for that alone. The defendant's letter of the 29th of October, 1823, produced by the plaintiff, clearly shows what this work was to be, and the price which was to be given for it. This

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constituted his claim originally ; for this he brought his suit and filed his declaration, which did not give the defendant any notice of the new and different cause of action. The amendment which he offered on the trial, was to vary the nature of his original demand, and to set up a claim on a distinct special agreement, for not being employed by the defendant for three months at trimming gig-bodies, at the rate or price of twenty-five dollars, and fifteen dollars for volants. The case in 4 Yeates, 365, decided in 1807, soon after the passing of the act, determines, in principle, the present question. We are of opinion, that the plaintiff was not entitled to the amendment, and that the judgment of the District Court should, therefore, be reversed.

HUSTON, J.—In this case, I think the amendment was allowable on principle and on authority, independent of the act of 1806. This amendment was admissible before the jury were sworn. It is the practice to allow an amendment now, after the second term, (though it was not formerly) when the cause of action is substantially the same. 2 Tidd's Prac. 754, 755. Before the end of second term, you may add a count for an entirely different cause of action, if it is one which can be founded on the writ, and joined with the former counts.

What is meant by the same cause of action? Not the same contract laid in the same way : for there the redundant counts will be struck out (at the cost of the attorney, in some cases) but the variations in the manner of stating the cause of action must be substantial. 1 Chitty Pl. 392, 393.

The true criterion is, whether it is the same cause of controversy which is stated in the additional count ; for if it is the same contract or controversy, it must be laid differently, or the new count is useless. If it is the same contract, or same injury, the party may, in a new count, lay it in a new way, to correspond with the proof and merits of the case. 8 Serg. & Rawle, 287 ; Cassell v. Cooke, and 11 Serg. & Rawle, 101, Newlin v. Palmer. If he adhere to the same ground of controversy, he may add a count substantially different from the former. 2 [*340] Serg. & Rawle, 1, Cunningham v. Day. *And fully on this point 15 Serg. & Rawle, 81, Rodrigue v. Curcier, a declaration on a policy against perils of the sea, &c., amended by adding a count for loss by barratry. Ib. page 83.

I do not agree that the act of 1806 does not extend the right of the court to allow amendments, as well as the time of the amendment.

In all cases where any suit has been brought in any court of record within this commonwealth, the same shall not be set aside for informality, if it appear that process has been issued, in the

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name of the commonwealth against the defendant, for money due, or for damages by trespass or otherwise, as the case may be; that said process was served by the proper officer, and in due time; nor any plaintiff nonsuited for informality in any statement or declaration filed, or by reason of any informality in any plea; but when, in the opinion of the court, such informality will affect the merits of the cause in controversy, the plaintiff shall be permitted to amend his declaration, or statement, and the defendant may alter his plea, or defence, on or before the trial of the cause; and if, by such alteration, the adverse party is taken by surprise, the trial shall be postponed until the next term. The word informality has been laid hold of: to me it seems it must be understood in a very broad and extended sense; it is to be of such kind as to affect the merits of the cause in controversy, and it may be of such extent as to change the matter trying so far, at least, as to take the adverse party by surprise, and require a postponement of the cause.

The matter in controversy here was this: the plaintiff had, at the instance of the defendant, gone to Havanna, and worked for the defendant several months; the dispute was, how much was due, and this depended on what was the contract. The plaintiff filed the common counts; not because he had no special contract, but because he did not know he could prove one. A man came from Havanna who could prove the contract, and the court allowed a new count, stating the same controversy, the same hiring; but instead of a *quantum meruit*, a special agreement for a certain price per job, and an engagement to pay for lost time, if not constantly employed. To me it seems it was the same controversy; the same general cause of action; the same voyage; the same work, but at a fixed price, and the additional agreement to find constant employment, and is within the spirit of the act, and the decisions of this court above cited.

I will just add, in 1 Binn. 588, *Gratz v. Phillips*, the writ and declaration charged the defendant as bailiff and receiver of plaintiff, and the court permitted a new count to be filed, in which the plaintiff was described as surviving partner of B., and his interest as having been held jointly with a certain B. deceased.

So in 8 Serg. & Rawle, 444, *Shannon v. Commonwealth*, in a suit on a sheriff's bond, the plaintiff was allowed to add new breaches after the jury was sworn.

Judgment reversed.

Cited by Counsel, 5 R. 129; 2 Wh. 172; 5 Wh. 500; 3 W. 28; 4 W. 259; 8. W. 356; 1 W. & S. 272; 4 W. & S. 142; 7 Barr. 494; 5 H. 518; 8 H. 13; 10 H. 282; 12 H. 326; 1 C. 408; 9 C. 409; 2 G. 281; 17 S. 130.

Explained in 4 H. 162.

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Cited by the Court, 1 Wh. 289; 1 M. 44, 72.

In 6 Wh. 483, an amendment was allowed while the counsel were summing up.

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*[PHILADELPHIA, JANUARY 25, 1830.]

Stout and Others *against* The Commonwealth.

IN ERROR.

A suit upon an administration bond, may be arbitrated under the act of the 20th of March, 1810.

If a party appear by counsel before arbitrators, and do not object to the want of proof of the service of the rule to arbitrate, at the time of their appointment, he cannot avail himself of the objection, on a writ of error.

WRIT of error to the Court of Common Pleas of *Northampton* county.

In the court below, this was an action of debt on an administration bond, brought in the name of the Commonwealth of Pennsylvania against John Stout, Caspar Mersh, and Henry Miller. The declaration was in the common form, in debt on a bond, dated the 19th of February, 1824, in the penalty of six hundred dollars. The defendant cravedoyer of the writing obligatory, and the condition thereof, which was granted in *hæc verba*. The bond, a copy of which was filed, contained the usual conditions of administration bonds.

The defendants pleaded performance, to which the plaintiff replied that they had not performed, and set forth several breaches. These breaches were assigned on the 14th of May, 1827, and on the same day, the plaintiff entered a rule, declaring a determination to have arbitrators chosen. On the day designated in the rule, arbitrators were chosen, but the defendants did not attend, and no proof was made of the service of the rule on them.

On the 23d of June, 1827, the arbitrators made the following report:—

“On the day, and at the place within appointed, the arbitrators within named met, and John Stout and Caspar Mersh, two of the defendants, appeared by their counsel, James M. Porter, Esq., objected to the jurisdiction of the arbitrators, to their being sworn in the case, or taking any cognizance of the matter submitted to them, it being an administration bond, &c. The arbitrators, however, after hearing the objection, proceeded to the investigation of the matters brought before them; and having been duly sworn, according to law, and proof having been made

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to them by the oath of John G. Eberts, of the legal service of notice on all the defendants, they now find for the plaintiff the sum of six hundred dollars, being the penalty in the administration bond, upon which the suit has been brought, together with the costs of suit."

On the return of the record to this court, six errors were assigned in the proceedings below, but on the argument, the points were reduced to the following two :

*1. That an action on an administration bond could not be submitted to arbitration, under the act of assembly of the 20th of March, 1810. [*342]

2. That there was no proof of the service of the rule to arbitrate previous to the appointment of the arbitrators, who were chosen in the absence of the defendants.

J. M. Porter, for the plaintiffs in error.

1. Though the first section of the act of assembly of the 20th of March, 1810, *Purd. Dig.* 16, declares, that all civil suits may be submitted to arbitration, yet this court has decided, that only those cases are within the purview of the act, in which judgment can be given for a specific sum or thing. *Jones v. Stratton*, 4 *Serg. & Rawle*, 76. In *Mann v. Alberti*, 2 *Binn.* 195, it was held, that a cause removed by *certiorari*, cannot be arbitrated. In *Hill v. Crawford*, 8 *Serg. & Rawle*, 477, it was said by *Forward*, *arguendo*, and not denied by *Foster*, the opposite counsel, that a suit on an official bond is not embraced by the arbitration law. The tenth section of the act of assembly, makes the award of arbitrators a lien on the real estate of the defendant, and it would certainly be very oppressive, if an award for the whole penalty operated as a lien, when only a small sum might be really due. The lien, too, is indefinite, for the act continues it until the award shall be reversed on appeal. The eleventh section directs the prothonotary, if an appeal should not be entered, to issue an execution to carry the award into effect, which cannot be done if the award be for the penalty, which is not the real sum due. If a suit on an administration bond can be arbitrated, the arbitrators must, according to the principles laid down in *Jones v. Stratton*, determine every matter in dispute between the parties, and give an award for the amount to which the party complaining is entitled, and not an award for the penalty, which is merely preliminary, and decides nothing.

2. By the third section of the arbitration law, the prothonotary is directed to act for the absent party, but proof must first be made of the service of the rule upon him, which was not done in the present instance. This objection is not obviated by the fact, that two of the defendants appeared before the arbitrators,

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for they did so only to object to their proceeding in the case, but the third did not appear, and his interests are not to be affected by the appearance of the other two.

The court declined hearing *Scott*, who was to have argued for the defendant in error.

PER CURIAM.—The penalty of an administration bond, is to secure the performance of covenants; but the breaches may as conveniently be tried by arbitrators, as breaches in an action for a penalty in articles of agreement, to which that tribunal is indisputably competent. The celerity with which a lien may be [*343] obtained, would be an *argument in favour of the jurisdiction. But the case being plainly within the letter, can be excluded from the purview only by some overpowering circumstance, palpably inconsistent with the scope of the act of assembly, and the principal object in view; nothing of which appears. As to the other exception, want of service of the rule to arbitrate, or what is the same thing, want of proof of it at the time of choosing the arbitrators, was not urged before the arbitrators, although the defendants appeared by counsel; so that having been waived there, it cannot be urged here.

Judgment affirmed.

Cited by Counsel, 3 W. 127; 8 W. 530; 10 W. N. C. 305.

[PHILADELPHIA, JANUARY 25, 1830.]

Savoy and Salter *against* Jones.

IN ERROR.

A., *cestui que trust*, tenant for life, under a post-nuptial marriage settlement, erected a building during her coverture, against which a person who furnished the bricks filed a claim under the act of March 17th, 1806, "securing to mechanics and others, payment for their labour," &c. Upon this claim a *scire facias* was issued against A., and B., her husband, who was entitled to a contingent remainder for life under the settlement, and C., who, under the settlement, was trustee for A. and those in remainder and reversion. A., B., and C. appeared to the *scire facias*, and pleaded to issue; but before the trial A. died, and B., her husband, became tenant for life under the settlement. Held, that notwithstanding B. became entitled in remainder upon the death of A., the lien, created upon the building by filing the claim, continued to bind against the remainder men and reversioners, and was not confined in duration to the life interest of A., who erected the building.

The persons, or description of persons enumerated in the act of assembly of the 17th of March, 1806, "securing to mechanics and others payment for their labour," &c., are not alone entitled to the remedies provided therein; but any person, without distinction, employed in furnishing materials for, or in erecting or constructing any house, or other building, is within the meaning of the act, and may file a claim, and thereby affect the house or building.

[Savoy and Salter v. Jones.]

UPON a writ of error to the District Court for the city and county of *Philadelphia*, the case was this :—

A *scire facias* was issued against the defendants below, upon a claim filed in the office of the prothonotary of the District Court for the city and county of Philadelphia, on the 15th day of November, 1817, in these words: “Robert W. Jones, of the city of Philadelphia, files this, his claim, for materials furnished, to wit: for bricks delivered by himself and servants at, and to be used in the construction of a certain three storied back building, adjoining and attached to, and immediately in the rear of a certain brick house, situate on the south side of Pine Street, in the city aforesaid, between Sixth and Seventh Streets, from the Delaware river, numbered *174, in the [*344] tenure, at the time the said bricks were delivered, of Sarah Salter, and adjoining ground then, or lately, of John Gest and ——— M’Adams; which said bricks were furnished and delivered since the passing of the act of the general assembly of the commonwealth of Pennsylvania, entitled, ‘an act, securing to mechanics and others payment for their labour and materials, in erecting any house or other building within the city or county of Philadelphia;’ passed the 17th day of March, 1806, and within six months preceding the date of filing this claim, to wit: in the months of May and June, in the year 1817, and on the furnishing and delivering and carting of which there remains due and unpaid to the said Robert W. Jones the sum of three hundred and ninety-three dollars and ninety-six cents, lawful money of Pennsylvania, with interest. Wherefore, to secure payment of the said sum of money, the said Robert W. Jones, agreeably to the provisions of the act of assembly aforesaid, files this, his claim, in the office of the prothonotary of the District Court of the city and county of Philadelphia, and declares the said sum to be a lien on the said building.

“ROBERT W. JONES.

“Philadelphia, Nov. 15th, 1827.”

The writ of *scire facias* was issued against Samuel Salter, Sarah Salter, his wife, and Francis Savoy, trustee for Sarah Salter, Samuel Salter, and those in remainder and reversion; but Sarah Salter having died before the trial, which took place March 27th, 1827, her death was suggested by Jones, the plaintiff, and the issues joined between Savoy, Samuel Salter, and Jones only, were tried by the jury. The pleas to the *scire facias*, upon which the issues so tried were joined, were payment, with leave to give the special matter in evidence, and *non assumpsit*.

The plaintiff, on the trial, read the claim filed, to the jury, to

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inform them of the subject-matter in dispute between the parties; and then read in evidence a deed, dated August 29th, 1809, between Samuel Salter and Sarah Salter, of the one part, and Francis Savoy, of the other part, by which, (among other parcels of real estate,) "All that two-story brick messuage or tenement, and lot or piece of ground, situate on the south side of Pine Street, between Sixth and Seventh Streets from Delaware, in the said city of Philadelphia, containing in front, or breadth, on the said Pine Street, fifteen feet, and extending in length or depth, southward, one hundred feet; bounded on the north by the said Pine Street, and on the east partly by a three feet wide alley, extending southward from Pine Street, thirty-six feet, and partly by ground of Mary Rojeay, on the south, by ground late of White Matlack, and on the west, by a two-story brick house and lot of Mary Rojeay, subject to a rent charge of sixteen dollars;" (being the premises and lot mentioned in the said claim filed,) were conveyed to the said Savoy, his heirs and assigns, for ever; but nevertheless, to and for the several [*345] *uses, and upon the several trusts, &c., declared of, and concerning the same; that is to say, to the use of the said Sarah Salter, and her assigns, for and during the term of her natural life, without impeachment of waste: And from and immediately after the determination of that estate, by forfeiture or otherwise, to the use of the said Francis Savoy and his heirs, during the life of the said Sarah Salter, in trust, to preserve the contingent uses, and other estates hereinafter limited, from being defeated or destroyed, and for that purpose to make entries, or bring actions, as occasions shall require; but nevertheless, to permit and suffer the said Sarah Salter and her assigns, to receive and take the rents, issues, and profits thereof, to and for her own use, during her life; and from and after the decease of the said Sarah Salter, to the use of the said Samuel Salter, if he shall survive her, for and during the term of his natural life, without impeachment of waste: And from and immediately after the determination of that estate, by forfeiture or otherwise, to the use of the said Francis Savoy and his heirs, during the life of the said Samuel Salter, in trust, to preserve the contingent uses and estates, hereinafter limited, from being defeated or destroyed, and for that purpose, to make entries, and bring actions, as occasions shall require; but nevertheless, to permit and suffer the said Samuel Salter, his heirs and assigns to receive and take the rents, issues, and profits thereof, to and for his and their own use, during his life: And from and after the decease of the said Samuel Salter, to the use of his children, in fee, and in default of such children, to the use of Sarah Salter, her heirs and assigns, forever." The said deed further recited, that

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the settlement contained in it, was made "only upon the condition of the said Sarah Salter, not recovering at any time hereafter any dower, or thirds, out of the real and personal estate of the said Samuel Salter." And it was further understood and agreed, between the said parties to it, "that the receipts of the said Sarah Salter, are to be good and effectual in law, and the rents, issues, and profits of the said messuages, or tenements, are not to be subject to the debts, control, or engagements of the said Samuel Salter." The plaintiff also read in evidence the deposition of John Powell, who said, "That he was by profession a bricklayer: That about nine years ago, he was employed by Sarah Salter, now deceased, (23d of December, 1826,) in the erection of a brick building of three stories, in the rear of house No. 174, on the south side of Pine Street, between Sixth and Seventh Streets from the Delaware. The bricks used in the building were sent by Mr. Jones; he was the man we used to send to, when we wanted bricks, and he came to us half a dozen or a dozen times at the building, to inquire what kind of bricks, and what quantity we wanted. Mrs. Salter employed me in this work, and paid me. She was the contracting party. I made my contract with her. He, (Mr. Salter,) however, was there towards the latter part of the time, and made the final payment on my bill. He has the receipt of witness *for [*346] the last or final payment. Mrs. Salter had paid him [*346] previously, from time to time along, as this deponent wanted money. The deponent thinks the quantity of bricks received from Jones, at that building, was forty thousand, perhaps more. Mrs. Salter told me she got these bricks from Mr. Jones. The bricks were higher in price at that time, than at present; they were, a few years before this building, as high as ten dollars a thousand. I do not recollect exactly the price in 1817. Rather higher in the spring than at other seasons. This building was put up some time after April. Mr. Salter lived in the Pine Street house all the time we were doing the work. The man who hauled the bricks was a witness before the arbitrators. The work, the brick work, was measured after it was put up, to ascertain the quantity. Mrs. Salter frequently said she had to pay Mr. Jones for these bricks."

Being cross-examined by the defendant's counsel, the witness said:—"This house stands right back of the main building, but does not join it; twelve or fourteen feet between them; may be twelve or fourteen feet, may be more. Consists of two buildings, with distinct chimneys between the two; three stories high; two separate entrances, or doors. I cannot say how long we had been at work when Salter appeared. I do not recollect whether it was said, that he was up town, or in the western

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country all the time; nor whether it was then, or afterwards, Mr. Salter said he was in the western country. I worked for her afterwards. These bricks came, they said, from near Schuylkill. I know Jones said they came from some where out by Schuylkill. I do not know that Jones was a brickmaker. I do not recollect Jones saying anything in relation to Peter Bob. I think Salter gave me a note for the balance due on the building, which note was paid. All the erection was under one roof. I think there was no partition wall between them; there was no fence between the building and the house on Pine Street. The house was topped out all but the chimneys, when Mr. Salter first appeared. I believe Mrs. Salter paid me money every week. I worked for Mrs. Salter afterwards, viz.: at the corner of Library and Fourth Streets, and corner of Fifth and Walnut Streets, and at other times; she paid me on these occasions—made the contracts with me. He never paid me only the balance, as I before stated. The chimney was between the divisions. If there was any partition wall, it is likely we run up scaffold high, and then built the scaffold on it. No parapet on the roof—a single pitched roof.” And having given the aforesaid evidence, the counsel for the said Jones rested his case.

The counsel for the defendants below then gave in evidence a general assignment, dated the 22d of October, 1816, made by Peter Bob, of the city of Philadelphia, brickmaker, of all his estate, real and personal, to the said Robert W. Jones, Samuel Salter, and Daniel Shuttle, reciting, that Shuttle and Jones were bound in a replevin bond to the sheriff of the city and [*347] county of Philadelphia, *into which they had entered at the instance of Peter Bob, against whom, in the action in which the bond was taken, judgment had been obtained for four hundred and seventy-five dollars: That Bob was indebted to Salter in one hundred and seventy-five dollars; and also to five of his working men in the sum of two hundred and fifty-five dollars; and, that he had agreed to transfer all his said estate for the benefit of all his creditors, after the demands aforesaid amounting to nine hundred and fifty dollars, were paid; and conveying all his estate to be applied, first for that purpose, and also, to pay the further sum of three hundred and sixty-eight dollars, shortly to become due, to Hanson Waters, for the rent of a brick yard, then occupied by Bob; and after satisfying the assignees, labourers, and Hanson Waters, to divide the remainder of the trust fund equally among all such of the creditors of Bob as should sign those presents.

The defendant's counsel then offered Samuel C. Elfrey, a witness, who testified as follows:—“I hauled them bricks from South Street and Front Street from Schuylkill to the building.

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I saw there a Mrs. Salter. I delivered them to Mrs. Salter. I hauled them with three carts. There was not more than forty thousand two hundred bricks, or thereabouts. Jones paid me for the hauling. I never hauled bricks for Jones to any other building or place. I cannot say I saw any other person there than Mrs. Salter."

Being cross-examined, he said :—"I did not know him, Peter Bob, right well. These bricks were hauled from a yard there, not exactly in the kiln. Bob and two young men helped to count them, and helped to load them. I do not know what Jones was. He said, he, Peter Bob, owed him money ; he went security, and took these bricks and sold them. I did not hear anything about rent and a landlord."

And also, John Hinchilwood, who testified as follows :—"Mr. Jones and Samuel Salter called on me one morning. I rented a lot of Salter ; they wanted to lay a kiln of bricks on part of my garden. I gave liberty to do it if they would take them away ; for this I received five dollars from Jones, and five dollars was deducted from the rent when I paid Salter. The bricks came, and some time after, Jones came with four carts, on purpose to take the bricks. I went to look for Salter, who was in the country, and got Salter. I saw them together, and then the bricks were taken away. I understood Jones took them away ; he was present waiting on the carts ; he said he was taking them to Mrs. Salter. I could not say there was a kiln ; but there was a very large quantity. This was ten years ago, or thereabouts. I saw him there once at least, and considered him to be Peter Bob, along with Jones. I had some conversation with Bob and Jones. They were ill-pleased with me, because I had no business to stop them ; which I did, because Salter told me so to do. They did not say Salter had nothing to do with the bricks. I *cannot tell who carried them away after that. Jones was a fringe-weaver. He was an English- [*348] man." Upon his cross-examination, he said :—"The lot was corner of Eighth Street from Schuylkill and Walnut Streets. I do not know where Peter Bob's brick-yard was."

The defendants further produced Samuel M. Solomons and Charles Culnan, to show, that the building did not correspond with the description of it in the claim filed ; but their testimony is here nowise material.

The counsel for the defendants then requested the court to charge the jury,

"1. That a lien binds not a building beyond the duration of a life interest in the land, upon which any building is erected, under a contract with the tenant for life ; and that the interest of a remainderman, whether for life or in fee, will not be affected

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by any proceeding under it, after the interest of the tenant for life is determined.

"2. That no persons, or descriptions of persons, can file a lien, other than those enumerated in the act of assembly of the 17th of March, 1806; and that unless they, the jury, believe, from the evidence in the cause, that Jones, the plaintiff, was a brick-maker, he could not file a lien."

But the court refused so to charge, and charged the jury as follows:—

Barnes, Judge.—"There are questions of law, which, at first, I intended to dispose of; but the facts have been strongly pressed by the defendants' counsel, and if the case is with them on the facts, recourse to matters of law is unnecessary. I have determined, therefore, to put the case to you on the facts. This is a *scire facias*. [Here he stated the nature of the action, and the parties.] A point of law is made, that Sarah Salter being dead, the lien is gone. For the purposes of this discussion, I shall say the law is not so; though there may be something in it, because the reversioner is not, perhaps, to be affected; but I tell you for the present, the law is not so—the lien continued. Now for the facts. That the plaintiff delivered these bricks to the carter, is most certain: That they have not been paid for by Sarah Salter, is most evident. It is said, that the plaintiff is not entitled to recover, because the property is joint property, and if so, the plaintiff cannot recover. If Jones sold these bricks, and they were sold in that character of trustee, the funds belong to the creditors of Bob, and Jones cannot divert the fund from its legitimate course to himself. The assignment was made on the 22d of October, 1816, to Jones, Salter, and Shuttle, and if the trustees accepted the trust, the plaintiff cannot recover; but if the co-assignees agreed, that Jones should take them in his separate character, then he might file a lien, and might recover; but there ought to be few presumptions in such [*349] a matter. These bricks were taken *from a yard near South Street. Jones said these bricks were given to him by Bob, for a debt he owed him. In case you believe this property passed to the trustees under the assignment, he cannot recover; but he may, if the property did not pass, &c., and he may, if you believe he took out of the fund these bricks, with the consent of his co-trustees, for his own use, and as a separate property. Upon the other points, I say, that a person who is not a brickmaker, may file a lien under our lien laws."

Upon this charge, to which the defendants excepted, the jury found a verdict for the plaintiff.

The plaintiffs in error assigned the general errors, and the following specific errors:—

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"1. That the court below refused to charge the jury, that a lien binds not a building beyond the duration of a life interest in the land, upon which the building is erected, under a contract with the tenant for life, and that the interest of a remainderman, whether for life or in fee, will not be affected by any proceeding under it, after the interest of the tenant for life is determined.

"2. That the court below refused to charge the jury, that no persons, or description of persons, can file a lien, other than those enumerated in the act of assembly of the 17th of March, 1806, and that unless they, the jury, believe, from the evidence in the cause, that Jones, the plaintiff below, was a brickmaker, he could not file a lien."

Ingraham, for the plaintiffs in error. The act of assembly of March, 1806, Purd. Dig. 545, is a very loosely worded law, but no construction of it has been called for, going so far as that contended for in this instance. It certainly did not contemplate, nor does it profess to do so, making any alterations in the rights of persons to their own property, independent of any interference by contract on their part. A mere trespasser, a guardian, or other fiduciary, could not affect the title of an infant, a *feme covert*, or a lunatic, by a breach of trust; and the argument for the plaintiff must go that length, if it be worth anything.

The reversioner cannot prevent the tenant of the particular estate from building a house during the continuance of his interest; and to subject the reversion to a lien creditor's sale, is making the reversioner virtually pay the debt. Suppose a lot let upon ground rent, with the usual clause of re-entry by the ground landlord, and the usual covenant by the grantee, that he will build a house to secure the payment of the ground rent, and a re-entry made by the landlord for non-payment of ground rent, could a lien creditor sell his estate for a lien said to be created on the building by the grantee, whose estate is gone by the re-entry? Such a decision would strike at the root of all property.

The construction, however, of this act, has been settled by decision. The case of *Kline v. Lewis*, (Ing. on Insolvency, 242;) *Lyle v. Ducomb*, 5 Binn. 585, in principle, decide this case. There, **Lyle* sold under his bond, and took the proceeds of the mortgaged premises in preference to the [*350] lien creditors; but he certainly might have recovered the land from *Ducomb*, by ejectment upon his mortgage, and no lien creditor could have disturbed his title to the pledged land so acquired, any more than he could the proceeds of the sale.

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As to the other point. This act was passed for the benefit of mechanics and persons who furnished materials for houses, or labour. The words of the act are not broader than the spirit. There is an enumeration of those by trades and callings, who are intended to be protected, and the protection is extended, by the next paragraph, not generally to every one, but to others employed in furnishing materials, &c.; that is, other persons, whose business it is to furnish, &c., not the world at large.

Upon what other principle is the well-established doctrine, that journeymen cannot file a claim to be sustained; the words cover them; yet, the question has been tried and acquiesced in. *Cobb v. Traquair*, Dis. Ct. Dec. 1819, 859; *Frank. Inst. Jour.* Vol. I. p. 97. So of paper-hangers, stainers, and plumbers. Surely a paper-hanger, who completes the wall, is as much employed in the construction of a house, as the plaisterer, who puts a single coat of plaister on it.

The act of the 24th of March, 1818, *Purd. Dig.* 547, in relation to curb-stone, decides the intention of the legislature. There was a decision against the claim, (*Leiper v. Smith*, *Frank. Inst. Jour.* 96,) and the act was passed to remedy it, by giving a lien, though the curb-stone is as much part of a city house, as a copper kettle is of a brew-house. *Gray v. Holdship*, 17 *Serg. & Rawle*, 413.

The words are, to "any person furnishing," &c.; and yet, the act of the 23d of April, 1829, (*Pamph. Laws*, 301,) gave a lien expressly to the City, for curbing and furnishing curb-stone; though the words of the act of March 24th, 1818, are certainly wide enough to include them.

Scott, contra.

The opinion of the court was delivered by

GIBSON, C. J.—The object of the legislature was to enable the mechanic or materialman, to follow his labour or materials into the building, which is pledged for the price without regard to the estate of the owner. Did the lien proceed from a contract with the owner, the argument drawn from the apparent injustice of permitting a tenant for life to affect the estate of the remainderman, who was not a party, would not be destitute of plausibility. But there is no real injustice in the matter, the owners of the several parts of the fee, being proportionately benefited; and it is consequently just, that the whole should bear the burden. But there are many cases in the law, in which an estate in remainder, is subject to the acts of the particular tenant. The [*351] lien, however, arises from the *credit having been given, not to the owner, but the building; and in a decisive

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majority of cases, the labour or material, is furnished to master builders, who have no interest in the ground: so that the construction contended for, would frustrate the object of the legislature nearly altogether. The remaining point is attended with still less difficulty. A lien is given in general and comprehensive terms, to every one without distinction, "employed in furnishing materials for, or in the erecting, or constructing," of any house or other building; and I cannot imagine why none but regular dealers in the article, or workmen bred to the particular craft should have the benefit of it. We have mechanics who can turn their hand to anything; and there is the same reason for hypothecating the product of a bricklayer's labour, for wages earned as a carpenter, as there would be for wages earned in his proper vocation; and a dealer *pro hac vice*, would seem to be as much within the reason of the law, as if he had no other business. The law may not, on the whole, be a beneficial one, even to the peculiar objects of its protection; still, it is entitled to a reasonable construction, and we cannot doubt, that the plaintiff is entitled to the benefit of it.

Judgment affirmed.

Cited by Counsel, 5 R. 301; 1 Wh. 520; 2 Wh. 119, 197; 4 Wh. 96; 4 W. & S. 219; 7 W. & S. 198; 2 Barr, 364; 4 Barr, 65; 6 Barr, 190; 2 J. 47; 4 Wr. 67; 21 S. 296; 2 W. N. C. 173.

Commented on and approved, in 4 Barr, 127, but in 14 Wright, 260, it is said to be qualified by Act of 28th of April, 1840.

Cited by the Court, 7 W. 11; 4 W. & S. 225; 8 Barr, 464.

[PHILADELPHIA, JANUARY 25, 1830.]

The Case of Field's Estate.

A promise to pay a specialty debt, which has been discharged by a certificate of bankruptcy, does not revive the original debt, as a debt by specialty. The original debt is merely a consideration, which renders the new promise available.

APPEAL from the decree of the Orphans' Court of Philadelphia county, on the settlement of the account of Joseph Field, administrator of John Field, deceased, and the distribution of the assets among the creditors of the said intestate.

The auditors to whom this case was referred, made to the Orphans' Court a report, of which the following part only is material.

"The auditors further report, that John Field, the intestate, was on the 8th day of March, 1804, discharged under the bank-

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rupt law of the United States, and regularly obtained his certificate of having conformed in all things to the provisions of the act of Congress on that subject: That the specialties or bonds, on which Messrs. West and Yarnall claim, are both dated previous to that time; but, in relation to the claim of William West, the auditors were satisfied that the intestate, after his discharge, re-assumed the said debt and continued to make payments on account of principal and interest, until the 15th April, 1823: That an amicable action of debt was entered on said note in the District Court for the city and county of Philadelphia, to [*352] September term, 1819; and that, on *the 8th of May, 1820, John Field, the defendant, delivered to the plaintiff certain promissory notes of David Kendrick, (which notes have not been paid,) as a collateral security for the balance due on the said note, and took a receipt for the said collateral security, particularly describing the original sealed note. The auditors, conceiving that these circumstances amount to a re-sealing and delivery of the original note, have allowed the same as a specialty. The claim of E. and E. Yarnall, is on a bond dated February 21, 1799, of John Field, in favour of Nicholas Waln and William Wilson, guardians of Joseph Head, Ellis Yarnall and Samuel Coates, conditioned for the payment of three thousand dollars, with interest, in the following proportions, to wit: one thousand dollars to Nicholas Waln and William Wilson, one thousand to Ellis Yarnall, and one thousand to Samuel Coates. In relation to this claim, it appeared in evidence, by the testimony of Ellis Yarnall, one of the original obligees, who assigned his interest in this demand to the claimants, at one of the meetings of the auditors, that immediately before, or just after the discharge of John Field under the bankrupt law, he informed the witness he had placed notes in the hands of his friends to meet this debt: That several years after, (the money not having been paid,) the witness again applied to John Field, and was then informed by him that he had a judgment against the estate of Daniel Williams, on which execution had been issued, and the real estate of the defendant, situate in the Neck, levied on and sold by the sheriff, and purchased for the use of said Field: That the title of Williams was disputed, but he had brought a suit against the person in possession, and, in case he recovered the land, he would pay his debt. The witness was not certain whether he was to pay it out of the money to be received for the said land, if it was recovered, or not. The intestate offered, if the witness was not satisfied with this, that he would make an assignment of the suit to him. He also stated that there were other lands of D. Williams, on which he had levied his execution, and he had no doubt that, out of these

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lands, enough would be received to pay this debt. A few days previous to the last of June, 1823, the witness again urged John Field for payment; he answered, he always considered Daniel Williams' property ought to pay this debt, because the original security was on it, though the money was for his, John Field's, use; he levied his judgment on that estate, and would pay out of it. The original bond was accompanied by a mortgage of John Field and wife, on property which descended to her from her father, Daniel Williams, but which was sold by the sheriff, and the whole of the proceeds appropriated to the payment of prior incumbrances. The property in the Neck levied on and sold by the sheriff, as the property of Daniel Williams, contained eighty-seven acres, one-quarter and twenty perches; it was purchased by Joseph Clark, for John Field, and conveyed to Field on the 18th day of April, 1818. On the 24th of April, 1818, Field conveyed a part of it (nine acres, *three-quarters [*353] and twenty-seven perches) to Stephen Girard, in consideration of the sum of three thousand dollars, but whether he ever obtained possession of the remainder, or any part of it, the auditors had no evidence. Conceiving this to be a promise to pay out of a particular fund, the auditors have allowed the amount proved to have been received from that fund by John Field, with interest; but as there was no evidence of any re-sealing or delivery of the bond, they have allowed it as a simple contract debt."

To this report, the following exceptions were filed:

"1. That the auditors have erred in not allowing the claim of the above-named Ellis H., Edward, and Charles Yarnall, assignees of Ellis Yarnall and Samuel Coates, who survived Nicholas Waln and William Wilson, as a specialty debt, the same claim being founded on a bond made and executed by John Field, the above-named intestate, in favour of Ellis Yarnall, Samuel Coates, Nicholas Waln, and William Wilson, which bond bears date the 21st of February, 1799.

"2. That the said auditors have further erred in calculating the interest from the 24th day of April, 1818, instead of calculating from the day of the date of the said bond, when it commenced, allowing a credit for the payments of the interest which have been made, and which are indorsed on said bond, until the interest should amount, together with the real debt, payable by the condition of the said bond, to a sum equal to the penalty thereof, or until the day the auditors signed the report."

Decree of the Orphans' Court, pronounced by King, President:

"The exceptions to the report of the auditors, raise two questions for the decision of the court. First, Whether the ex-

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ceptants are specialty creditors? Second, From what period is interest to be calculated upon the debt? The facts are few and unequivocal. John Field, the intestate, on the 2d February, 1799, executed a bond to Nicholas Waln and others, conditioned for the payment of three thousand dollars. On the 8th of March, 1804, the bond being due and unpaid, Field obtained his certificate as a bankrupt, under the existing act of congress of the United States. There is no evidence in the cause, that Waln and others, ever proved their debt under the commission, or received any dividend of the effects of the bankrupt. On repeated occasions, between the time of his bankruptcy and his death, which took place in _____ Field promised the exceptants to pay this bond as soon as he could realize funds from a particular source, to which he referred. Before his death, the property from which he contemplated payment came into his hands. The auditors have considered the claim of the exceptants as arising from simple contract, and not as a bond debt, and have allowed interest upon it from the 24th of February, [*354] *1818, the day upon which Field received three thousand dollars from a purchase of part of some land recovered by him, and which was the source from which, when rendered available, he promised payment to the exceptants. The questions involved in this case lie in a narrow compass, though the result of their decision is of considerable pecuniary interest to the parties. It is unquestionable law that a promise made by a bankrupt to pay a debt barred by his certificate, again subjects him to a legal liability for its payment. The only dispute appears to be, whether it revives the old debt, or whether the old debt is a good consideration for the new promise. It seems, in practice, that declarations are framed upon either and both these views, and have been equally sustained. *Trueman v. Fenton*, Cowp. 544; *Cooke B. L.* 526; *Selwyn N. P.* 272, 1 Chitty, 40; 8 Mass. Rep. 127; 4 Johns. Rep. 36; 14 Johns. Rep. 178; *Comyn on Cont.* 427. All these cases have arisen from original parol contracts, where no settled rule of pleading was interfered with, by either mode of declaring. When, however, a debt, due before bankruptcy, arose from a specialty, it is difficult to understand how any other than an action upon the specialty could be sustained against the bankrupt in the event of a new promise. It is a rule as firmly settled as any in the law, that *assumpsit* will not lie upon a promise to pay a debt secured by specialty, unless upon a new consideration; *Landis v. Urie*, 10 Serg. & Rawle, 321; Cowp. 129; 1 Dallas, 208; 1 Bac. Ab. 257; *Assumpsit, A.* Upon a promise, then, after bankruptcy, to pay a bond debt, and where the only consideration for the promise is the old debt, the promisee must recover on his bond, or he can-

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not recover at all. This view of the subject would seem to go far towards supporting the doctrine contended for by the exceptants. But the technical rules of pleading are only important so far as they serve to illustrate principles, and the question before the court must depend for its solution upon what is the legal effect of bankruptcy upon antecedent debts. Considered with reference to a subsequent promise of payment made by the bankrupt, my view of the statutes of bankruptcy and limitations is, that they are but legal exemptions, which, if judicially interposed, relieve a party from obligations otherwise enforceable in law, and subsisting in morality and good conscience. If the party entitled to avail himself of the exemption, either expressly waives it, or tacitly, as by omitting to plead it, it is the same with reference to the claim which is the subject of controversy, as if these statutes had never operated on it. Before the waiver the obligation was imperfect; a subsisting right, the remedy for which was arrested by positive law, from reasons of general convenience; by it, right and remedy are reunited, and the obligation becomes complete. These are apparently the views of the Chief Justice, as expressed in *Jones v. Moore*, 5 Binn. 577. He says that a debt barred by the statute of limitations is not extinguished; that it remains due in conscience, and, in some respects, at law; for, *if the defendant omits to plead [*355] it, he is considered as having waived the benefit of it, and the plaintiff may recover against him. In the recent case of *Willing v. Peters*, 12 Serg. & Rawle, 177, the same doctrine is considered as applicable to the case of bankruptcy. Indeed, the language of the court, in this case, goes far towards the decision of that before us. 'No recovery,' says the Chief Justice, 'can be had against the bankrupt; yet, by the common sense and feeling of mankind, the debt exists, until it be actually paid.' The necessity of pleading bankruptcy, (*Chitty*, 474,) is strong evidence that it is viewed as only affecting the remedy. If this is correct doctrine, and I do not doubt it, the present question is settled by it. Nicholas Waln and others were the just bond creditors of John Field. By law their remedy against him was destroyed, although their right, abstractedly considered, remained unimpaired. He voluntarily, as he could lawfully do, removed this legal bar, and in doing so remitted the exceptants to all their original rights. In the opinion of the court, the first exception is sustained.

"The question of interest I can scarcely consider as open, after the decision of the Supreme Court in the case of *Shultz's Appeal*, 11 Serg. & Rawle, 182. There a bond creditor of an insolvent estate was allowed interest upon his bond to the time when the assets were apportioned. The exceptants are entitled

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to interest upon their bond, until principal and interest equal their penalty, which is all they ask for. Upon this principle the auditors will settle the interest account. The report of the auditors is set aside, and recommitted to them, with directions to report a new distribution, according to the principles of this decree."

Exception to the decree of the Orphans' Court.—"That the said court have admitted E. H. and E. Yarnall to a claim upon the funds in the hands of the administrator, as specialty creditors, when they were no more than simple contract creditors."

W. Smith, for the appellants.—The preference given by law to specialty creditors, both in England and in this country, is no favourite in courts of equity. The origin of this preference cannot be traced, nor can any good reason be given for it. In England the courts distinguish between legal and equitable assets, and whenever they can, make an equal distribution. In New York, the same principles have been adopted. Field, who had received an absolute discharge from his debts, afterwards, unknown to his other creditors, promised to pay a particular creditor, who now attempts to sweep off everything. His claim is highly inequitable, and the court will lay hold even of technical means to do equal justice. The bond debt having been completely discharged by the bankrupt law of the United States, (Story's Laws of U. S. 744,) it could not, from its very nature, be revived, except by the same solemnities which gave it existence. No case can be found in England to *support the [356] doctrine contended for on the opposite side, which is strong negative evidence against it. The only cases to the point are *Seabury v. Martson*, 2 Penn. Rep. 702, and *Ludlow v. Vancamp*, 2 Hals. 113, both of which are against it. The cases which may be cited to show that a new promise revives the old debt, are not to the purpose. They are all cases of simple contract debts, and debts barred by the act of limitations, where the debt itself was not discharged, but the remedy taken away. All these decisions turn upon the form of pleading, the idea of the old debt being revived by a new promise, being resorted to to support the declaration. There is no case in which the court had occasion to look to the nature of the debt itself.

Bouvier, contra.—Both parties being entitled to payment, if the assets be sufficient, they have equal equities; and the court must decide this cause upon legal principles. A discharge under the bankrupt law is not payment, and nothing short of payment will absolutely discharge the debt. It cannot be called payment, because nothing is paid, and, consequently, the debt is

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not extinguished. If it were extinguished, a new promise would be *nudum pactum*, which is not pretended. Such a discharge is merely an exoneration from liability, until the debtor thinks proper to resume it; it is a bar to the remedy, not to the right. It makes the debt voidable at the option of the debtor, who may plead his certificate or not, according to his pleasure. It is aptly said, by one of the judges in one of the New Jersey cases cited on the other side, that a debt like this has a body and a soul, and though the body be dead, the soul lives, and the moment it is breathed again into the body, it brings it to life. Not only numerous cases, but all the precedents show that it is the old debt which is to be recovered by virtue of a new promise, and not a debt, the consideration of which is a new promise. If the original debt be revived, it is, of course, revived in its original character. 1 Chitty Pl. 473; Lord v. Shaler, 3 Conn. Rep. 131; Levy v. Cadet, 17 Serg. & Rawle, 128; Jones v. Moore, 5 Binn. 577; 1 Chitty Pl. 40; 1 Cooke's Bankt. Law, 526; 1 Selw. N. P. 272; Maxim v. Morse, 8 Mass. Rep. 127.

The opinion of the court was delivered by

GIBSON, C. J.—It seems to be agreed that a debt discharged by a certificate of bankruptcy, is a valid consideration for a promise. How this opinion came to be adopted, I am at a loss to imagine. Contracts are made in reference to the existing laws which tacitly become a part of the stipulations of the parties; so that the creditor, looking to the possibility of the debtor's bankruptcy, indemnifies himself for the risk in the enhanced price of his commodity; and standing his own insurer, he cannot, even in conscience, object to bearing the loss. Beside, having taken the benefit of the commission, at the expense of all the bankrupt's remaining prospects, he elects to receive in full satisfaction exactly what the law allows him, *and [*357] absolves the bankrupt from further obligation, either in honour or conscience. The only debt to which this is inapplicable, is that of a loan, originating in pure benevolence. But a promise to pay an antecedent debt, would be a positive breach of faith, to those who had given credit on the foot of the certificate. But, whatever we may suppose the law ought to have been, it is settled by a train of decisions not now to be questioned, that a debt discharged by a certificate of bankruptcy, is an available consideration for a new promise. Still the new promise, and not the old debt, is substantially the meritorious cause of action, although it may be treated differently in the pleadings. The form of the declaration was doubtless produced by a notion which long prevailed, that a debt, although barred,

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might nevertheless be revived, by any acknowledgment which amounted to a waiver of the bar. This notion is now exploded, both here and in England; it being held almost universally, that a recovery can be had only on a new promise, of which an acknowledgment of indebtedness may be evidence. Still the anomaly of declaring on the old promise remains. There is, however, but one case in the English books in which an opinion was intimated that a specialty might be revived by parol. The question could not arise on the statute of limitations, which has no effect on specialties; and cases of presumption, from length of time, are not to the purpose. There, an acknowledgment of the debt operates as evidence, not of a new promise, but to rebut an inference of payment; consequently, the recovery is of the old debt, the remedy having never been barred, or even suspended. But had the notion now pressed on us received countenance, it would have given rise to frequent litigation, in cases of bankruptcy; yet we find, in the English books, the solitary case of *Alsop v. Brown*, Dougl. 192, in which Lord Mansfield undoubtedly intimated that a bankrupt's acknowledgment of the debt might render him liable on his bond, as on a new contract. This, however, was said with apparent hesitation, and at a time when the doctrine of revival under the statute of limitations was at its meridian.

Such, then, being the state of the English decisions, how stands the matter nearer home? In *Jones v. Moore*, 5 Binn. 573, our own court, I believe, led the way in returning to a rational construction of the statute of limitations, by holding that the acknowledgment of debt barred by it is not a revival of the debt, but evidence of a new promise. I pretend not to speak with certainty, but I am not aware that any court of a sister state had preceded it. It is more to the purpose that the doctrine now prevails generally, if not universally; and thus it stands as to debts by simple contract, under the statute of limitations. In *Ludlow v. Vancamp*, 2 Halsted, 113, the Supreme Court of New Jersey was divided in opinion on the question whether a bond barred by their statute of limitations, was even a consideration for an express promise to pay it, no doubt being [358] entertained by any of the judges, that the plaintiff was *without remedy, on the bond itself. I have found no other case where the debt was originally due by specialty, and but the case of *Maxim v. Morse*, 8 Mass. 127, where it was by record; and there it was held that a judgment from which the defendant had been discharged by a certificate of bankruptcy, might, by a subsequent promise, be made the foundation of an action of debt. Thus we see that, against this case and *Alsop v. Brown*, are arrayed all the decisions in England and this

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country; and how does the question stand on principle? A bond is not the debt itself, but evidence of it; and, although there may be a duty independent of the instrument, yet a subsequent promise ought not, one would think, to preclude the party from showing an original want of consideration, even at law. Besides, it is impossible to conceive how an instrument can regain its properties, once lost, except by a repetition of the solemnities from which it originally derived them; and nothing is clearer than that a promise to pay, is not a new delivery. The argument is, that a waiver of the bar estops the obligor from taking advantage of it, so that the bond necessarily stands before the court on original grounds. There undoubtedly is such a thing as an estoppel *in pais*; but it is always by an act done, such as partition, entry, livery, acceptance of rent, or of an estate. Besides, no estoppel is to be taken by inference or argument, even in pleading. It ought to be a precise affirmation of that which makes the estoppel, which this promise is not; and the doctrine, although beneficial in many respects, is not to be extended to new cases. I am, therefore, of opinion that the debt in question is not entitled to rank as a specialty.

HUSTON, J., dissented. SMITH, J., concurred with GIBSON, C. J. ROGERS, J., and TOD, J., did not hear the argument, and took no part in the judgment.

Cited by Counsel, 2 Penn. R. 491; 4 Wh. 498; 3 W. & S. 268; 8 Barr, 340; 2 J. 245; 1 W. N. C. 68; 13 W. N. C. 323; 14 W. N. C. 362.

Cited by the Court, 2 Penn. R. 523; 4 R. 456.

*[PHILADELPHIA, JANUARY 25, 1830.]

[*359]

Witmer and Others *against* Schlatter and One Hundred Sixty-seven Others.

A plea in abatement, alleging that there are others liable with the defendant, does not admit the existence of any contract whatever, the new parties being conditionally named, to enable the defendant to connect them with whatever contract may be proved. It operates no further than to preclude an objection, for want of parties a second time; but the plaintiff is nevertheless bound to prove his case against all who are named, as if there never had been a proceeding to ascertain them.

Against those who pleaded, the record is evidence that all who are alleged to be partners, are so in fact; but all others must be proved to be partners in the ordinary way.

If an individual enter into a contract with a company, doing business under articles of association, one of which provides for an application to the legislature for a charter, which is afterwards granted, the style and general organization of the association continuing the same, the responsibility of the com-

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pany as partners is not changed by the act of incorporation, unless the express consent of the party who contracted with it be given, notwithstanding the act of incorporation declares that all contracts made by the association shall be as obligatory on the same, and on the other parties thereto, as if they had been made subsequently to the act of incorporation; and that it shall be lawful for the corporation and the parties to maintain actions to enforce the performance thereof, as fully and effectually as if the same had been made by, or with the corporation.

THIS cause having been tried at Nisi Prius, a verdict was rendered on the 13th of February, 1829, in favour of the plaintiffs, for ten thousand three hundred and twenty-four dollars and forty-two cents, subject to the opinion of the court upon the whole evidence.

The facts, so far as they are material to the elucidation of the points decided, were these: On the 16th of August, 1817, William Schlatter, Condé Raguet, Benjamin Warner, John M. Price, and Simon Gratz, who styled themselves the contracting committee of the Philadelphia and Pittsburg Transporting Company, authorized their agent, Thomas Harper, to contract with the plaintiffs, David Witmer, David Witmer, Jr., John Witmer, and Jacob Witmer, for the transportation of goods from Downingtown to Harrisburg. On the 12th of December, 1817, two contracts in writing, between the plaintiffs and Thomas Harper, agent for the managers of the Philadelphia and Pittsburg Transporting Company, were executed, by each of which the plaintiffs bound themselves in the penalty of thirty-five thousand dollars, to provide horses, harness, and drivers, and attend to the transportation of goods between Downingtown and Harrisburg, making themselves responsible for all damages occasioned by the unfaithfulness, neglect, or want of skill of the persons they might employ. For this they were to receive one hundred and eighty dollars per mile in quarterly payments, on [*360] each contract, for a line of wagons going and *coming every thirty-eight hours. The contracts were to take effect on the 1st of April, 1818, and continue until the 1st of April, 1819.

The plaintiffs, after having given in evidence the contracts on which the suit was brought, and testimony to prove performance on their part, gave in evidence the articles of association of the Philadelphia and Pittsburg Transporting Company, and the books of minutes of the managers, which were produced by the defendants on notice. The articles of association were entered into on the 20th March, 1817. The eighth article was in these words:—

“Article 8. The board of managers shall be a committee to make application to the legislature for a charter of incorporation for this company, and shall, in due time, prepare a plan there-

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for, to be submitted to a general meeting of the stockholders for their approbation."

By an act of assembly, passed the 19th of March, 1818, the company was incorporated, the style, articles of association, and general organization of it continuing the same as before. The second section of the act of incorporation was as follows:—

"Sect. 2. And be it further enacted by the authority aforesaid, That all the joint stock, and all the estate, property, and effects, real, personal, and mixed, and all the evidences thereof, and vouchers, and other documents whatsoever, belonging to, held, or claimed by the said association at the time of passing this act, shall be, and the same are hereby transferred to, and vested in the corporation hereby created, absolutely and completely to all intents and purposes; and the articles, rules, and regulations heretofore entered into by the said association, and not inconsistent with the provisions of this act, shall, so long as they remain unaltered and unrepealed, be valid and binding on the members thereof; and all contracts whatsoever, made and entered into by, or with the said association, shall be as obligatory upon the same, and upon other parties to the said contracts, to all intents and purposes, as if the same had been made and entered into subsequently to this act of incorporation: And it shall be lawful for the said corporation, and for the parties to any such contracts, to maintain actions at law, and otherwise enforce the due performance thereof, as fully and effectually as if the same had been originally made by, or with the said corporation."

The plaintiffs also offered in evidence the record of a former suit, brought upon the same contracts, by the same plaintiffs, against William Schlatter, Condry Raguet, Benjamin Warner, John M. Price, and Simon Gratz, and the plea in abatement therein filed, averring, that the promises and undertakings in the declaration mentioned, (if any such were made,) were made jointly with others, whose names were given. The defendants objected to the admission of the record, but the court permitted it to be given in evidence, and, at the request of the defendants' counsel, noted the objection.

*The defendants gave in evidence letters from the plaintiffs, relating to the contracts, and receipts given [*361] by them at different times, viz., on the 1st of July and 15th of October, 1818, and the 5th of January, and 8th of May, 1819, for moneys paid to them on account of their contracts with the defendants.

Kittera and T. Sergeant, for the plaintiffs.

1. The admission of the record in evidence was immaterial,

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as the partnership was fully proved without it; but it ought to have been received. The plea was the declaration and admission of the parties, and evidence against themselves. 4 Stark. 1072, 1074; 2 W. Bl. 947; 1 Vin. 89; Witmer v. Schlatter, 15 Serg. & Rawle, 150.

2. The plaintiffs did not know who composed the company. They contracted with those who stipulated to be responsible; those who were personally engaged. The contract once made, must retain its original character, unless the contrary be expressly agreed. It is not to assume one form or another, as contingencies arise, unless it be inserted in the contract that it shall be subject to such alterations. The original contract was with the company as individuals, and the act of assembly could not shift the responsibility from the partnership to the corporation, without the assent of the plaintiffs. That assent was never given so far as appears from the evidence, for it certainly cannot be inferred from the letters and receipts of the plaintiffs. All their acts were in pursuance of the original contract, and with those who were the proper organs of the company, both under the articles of association, and the act of incorporation.

Binney and Chauncey, for the defendants.

1. The plea was not admissible for any purpose. The parties given by it are different from the parties to this suit. Only five of the present defendants were parties to the abated suit. The names in the declaration are different from those in the books, so that the case was not made out by the books alone. They were the books of a corporation, and not of a partnership. 1 Phill. Ev. 222, (242;) Sweeting v. Turner, 10 Johns. Rep. 216; 1 Chitty Pl. 41.

2. The defendants are not liable in any event, the plaintiffs having adopted the corporation in discharge of the association. The original contract was merged, with the assent of the plaintiffs, in the responsibility of the corporation. It was entered into, in the first instance upon the basis of corporate responsibility, for it is irrational to suppose the plaintiffs did not know everything relating to the association with whom they were contracting, at least so far as related to themselves. They were consequently aware that the eighth article provided for an application to the legislature for a charter. This provision formed part of the contract, and that the plaintiffs considered their [*362] agreement as transferred from the association *to the incorporated company, is fully proved by their subsequently corresponding with it, and giving receipts to it as such. They were at least bound to elect between a partnership and a

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The opinion of the court was delivered by

GIBSON, C. J.—The nature of this particular plea in abatement is misapprehended in supposing that, to show the parties, the defendant must necessarily show the contract; and that in a second action, the record is evidence, at least, against all who pleaded, not only of partnership, but of the whole case. The extent of the defendants' allegation is best determined by the nature of the mischief which the plea was devised to remedy. Previous to *Rice v. Shute*, 5 Burr. 2611, the omission of a joint contractor was a ground of nonsuit. The defendant folded his arms till the plaintiff made out a case, by proving the contract as laid, when, if the defendant succeeded in showing additional parties, the plaintiff failed on the principle of variance, as he still does where too many are joined; or he failed by proving too much, if he showed a contract with more than were named in the writ. But in no case was the defendant bound to prove a contract with any one, or any other substantive part of the plaintiff's case. The hardship was, that the plaintiff being ignorant of the proper parties, was foiled as often as a new joint contractor was disclosed; and to remedy it, Lord Mansfield did what? Simply required that objection for want of parties should be pleaded in a way to prevent a repetition of it, or waived altogether. This, then, being the nature of the mischief, and the extent of the remedy, what change has it produced in the order and effect of the proof? The plea neither asserts nor admits the existence of any contract whatever, the new parties being conditionally named, to enable the defendant to connect them with whatever contract may be proved. The order of proof, therefore, is the same that it was when the matter was tried on *non assumpsit*; and the plaintiff fails to maintain his part of the issue, unless, as formerly, he proves a cause of action in the first instance. The proceeding was not devised to relieve him from the burden of any part of his case, or to give him any other advantage than a certainty of proceeding in a new action, without further objection for the same cause, either from those who pleaded or those who were subsequently joined. A successful plea in abatement, therefore, operates no further than to preclude an objection for want of parties a second time. But giving the plaintiff the benefit of that, he is nevertheless bound to prove his case against all who are named, as if there never had been a proceeding to ascertain them. Against those who pleaded, the record is undoubtedly evidence, that all who were alleged to be partners, are so in fact; but although the fact of

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partnership may be established by the separate admissions of all, it cannot be by the admissions of less than all, for the [*363] *plain reason that a confession is competent to affect none but him who made it. Then, conceding that the plea in abatement was competent evidence of partnership, as regards some of the defendants, and that, had there been evidence of that fact against all, proof of a contract with the firm would have been proof of a contract with all; yet, against many of the defendants not parties to the former action, there was no evidence of partnership whatever; consequently, the verdict is not to be sustained. It is not an argument to say that on strict rules of evidence the plaintiff may be baffled for ever. It is an undoubted defect in our judiciary, that it is incompetent to afford facilities for the attainment of justice which are universally had elsewhere. As long as the legislature shall withhold the powers of a Court of Chancery, for the discovery of facts and circumstances to found an action at law, so long must the hardship felt in this particular instance endure without a remedy. We cannot wrest the law from its purpose, to cure an evil, the remedy for which, is not within our province.

The remaining point is more substantial. I do not understand it to be contended, that the members of the company were not, at first, individually bound. But the articles of association were framed with a view to eventual incorporation; and it is assumed, from this circumstance alone, that the parties treated on the basis of an understanding, that the character of the contract should follow that of the association. There is not a spark of evidence that the provision for incorporation was known to the plaintiffs; nor, were that otherwise, had they reason to suppose, that in conferring corporate powers, the legislature would meddle with vested rights. It is, indeed, supposed, that he who deals with a company, is bound to know the principles on which it is constituted; in so much, that he *ipso facto*, agrees to contract according to the conditions of the articles. So differently is the law held in actions against joint stock companies, both here and in England, that the stipulations in the articles, have never been allowed to exempt the members from liability beyond the joint funds, or to restrain their responsibility to third persons, on the general principles of partnership. It was, indeed, intimated, by Justice Platt, in *Skinner v. Dayton*, 19 Johns. Rep. 513, and by one of the judges of this court, in *Hess v. Werts*, 4 Serg. & Rawle, 361, that partners may limit their liability by an explicit stipulation between them and the party with whom they contract, but that such a limitation is never a matter of silent inference. "But stipulations of this kind," says the learned commentator on American law, "are looked upon un-

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favourably, as being contrary to the general policy of the law ; and it would require a direct previous notice of the intended limitation, to the party dealing with the company, and his clear understanding of the terms of the limitation." 3 Kent's Com. 5. Without such direct notice, therefore, the question of assent to the articles, is not one of fact, but of law. Then, without any previous assent by the parties to be *affected, the legislature has thought proper to declare, that "all con- [*364] tracts whatsoever, made and entered into by, or with the said association, shall be as obligatory on the same, and on the other parties to the said contracts, to all intents and purposes, as if the same had been made and entered into subsequently to this act of incorporation : And, it shall be lawful for the said corporation, and for the parties to any such contracts, to maintain actions at law, and otherwise enforce the due performance thereof, as fully and effectually, as if the same had been made by, or with the said corporation." It might be said, that this does not expressly absolve the members from individual liability, but enables their creditors to sue them or the corporation at their election. But the legislature, it seems to me, manifestly intend to substitute the responsibility of the corporation exclusively ; to do which, without the assent of all parties, it was altogether incompetent. Such a law would be in direct contravention of the provision in the Federal Constitution, which interdicts the impairing of contracts. What evidence is there, then, that the plaintiffs subsequently agreed to release the defendants and accept the corporation as their debtor. They received moneys due on the contract, from the treasurer of the corporation, and corresponded with its agents and members, with a view to future engagements. No organic change had, however, been made by the act of incorporation, the officers and their functions being the same, and they received their money from the hand whose business it would have been to pay it under the articles of association ; so that, if the mere receipt of money were to prejudice them, they never could have been paid at all. For the rest, it is obvious, that a recognition of the corporation for prospective purposes, is not a retrospective admission of the validity of provisions in the act of incorporation, not at all necessary to corporate existence. To bind the plaintiffs, their assent to this particular provision, whether precedent or subsequent, ought to be direct and unambiguous. We are, therefore, of opinion, that the parties to the contract are personally liable ; but for the insufficiency of the evidence of partnership, as to some of the defendants, a new trial is awarded.

HUSTON, J.—The material facts are, that about the 1st of

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April, 1817, a number of persons associated under the name of "The Philadelphia and Pittsburg Transporting Company." The object was to increase the facility and despatch of carrying goods between the two places named. On the 1st of April, managers were elected, a contracting committee appointed, and soon after an agent. A great number of people subscribed for shares in the company; but whether all subscribed before, or some after the contract with the plaintiffs, was not proved. On the 12th of December, 1817, a contract was entered into between the plaintiffs and the agent of the company, in writing, by which the plaintiffs agreed to furnish horses and drivers, and to carry [*365] from Downingtown to *Harrisburg. Articles of agreement, stating the objects and plans of the company, were agreed to on the 1st of April, 1817; and the eighth of those articles stated, distinctly, the intention of the company, to endeavour to procure a charter. We must take it, that those who entered into a contract with the agent of the transporting company, knew who the company were, or, at least, as many of them as satisfied him; and as much of the objects of the company, as was necessary to make the contract a rational one—they were bound to know so much. By the contract, no labour was to be performed until the 1st of April, 1818. On the 19th of March, 1818, the company was incorporated, and the name and articles of the company continued the same as before incorporation.

The plaintiffs brought a former suit against the seven managers. The defendants in that suit pleaded in abatement, that the contract, if any was made, was not with the defendants alone, but with them, and one hundred and sixty-seven others, and named the others. Issue was taken on this plea, and a trial, and verdict, and judgment for the defendants. This suit was then commenced, and again a plea in abatement, as to one name, was put in, (see 15 Serg. & Rawle, 150,) and overruled.

After the jury were sworn in this cause, the plaintiffs offered in evidence the record of the first suit, containing the plea in abatement, which had in it the names of all, or most of the defendants in this suit; this was objected to, and admitted, and this admission was the first subject of discussion in this court.

A range, wider than necessary to be followed here, was taken in the argument. The plaintiffs insisted, that it was evidence conclusive against all the defendants, or, if not, *prima facie* against all; or if not, conclusive against those who had pleaded that the plea in abatement. The plaintiffs further said, if it was not evidence, yet, as the articles of agreement were afterwards read without objection, and all the names were subscribed to them, the legality of reading this record against those who were

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not parties to the first suit, was cured by giving legal evidence afterwards, fully proving the same thing.

The defendants denied, that the record was admissible for any purpose; or that the names at the foot of the articles of agreement were proved or read, or that they made out the case, if read.

The assertion, that a record is not to be read in evidence, except against parties or privies, is too narrow. Some exceptions were admitted, as the record of conviction of the principal, in order to show that an accessory may be tried; judgment in rem., and matters of public right, as tolls and common.

There are many other exceptions in daily use.

1. In making out a title in ejectment, the plaintiff shows a judgment against A., execution and sale to the plaintiff, and gives this in evidence, to prove a title in himself against B., the defendant in ejectment; and yet he, B., was no party to that judgment against A.

*2. In cases where a party may sue one of two [*366] persons, but not both; after suing one, the plaintiff [*366] sues the second, who gives in evidence the first suit, to prove the election.

3. Where he may sue several, but can get but one satisfaction. The plaintiff sues A., and levies his money by execution, and afterwards sues B.; B. may give in evidence the record, though no party to it, to prove that the plaintiff is already satisfied.

4. In ejectment, a defendant may give in evidence a title in a third person; but it must be a valid, subsisting title, not one abandoned, or barred by the act of limitations. After giving such title in evidence, he may give in evidence an ejectment verdict and judgment in favour of the owner of that title, not to prove, that it is a good title, but that it is not abandoned by the owner, or barred by the act of limitations.

5. So, a verdict and judgment against a master, is evidence in a suit by him against his servant, who committed the trespass, but not conclusive. So, a verdict and judgment of eviction, by a person warranted against his warrantor, which may be conclusive if notice has been given to the warrantor, or not conclusive, if there has been no notice; still, it is evidence to prove the fact of eviction. In short, where the verdict and judgment are on the same matter, and are pleaded or offered in evidence, as conclusive in the suit trying, the record is not admissible, unless between the same parties, or those in privity with them. But where a fact forms part of the proof of a claim, or of a defence, and that fact can be proved by the record of a suit, it may be so proved, as in the cases put above,

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and in some others. So, when a plea in abatement was pleaded, in the cause now trying, the record of the former suit was evidence to prove the fact, that a plea in abatement had been pleaded once before to the same demand, against some of the present defendants.

I think it was evidence of a solemn admission by those who pleaded that plea in abatement, that they form a part of those now sued, who made the contract declared on, if such a contract was made. The plaintiffs are not bound to prove all the defendants to be contractors, by one witness or one kind of proof; and I think this was admissible as respected those who pleaded it, and no further.

As to whether the same thing was proved by the articles of agreement, I think there was a misunderstanding at the bar, and perhaps on the bench, in consequence of it; both parties supposing the case as against all the defendants, proved by the record of the first suit. When the articles were offered to be read, the defendants did not object to the reading of them, unless the signatures were proved. Being then read, and no objection made, the judge considered the whole, including the signatures, admitted. I say, I suppose this was the case. The same mistake will not occur at another trial. Whether the articles, when all the signatures are proved, will support the plaintiffs' case, I cannot now say.

There were other grounds of defence discussed, of serious [*367] *importance. The contract certainly was made before the incorporation: whether with them as a company or firm, having partnership property, or as this company was composed, generally by one member of another mercantile or manufacturing firm, signing the name of his firm; whether any of the firm was bound except him who signed, unless something more was done, was not discussed; but at the time the contract was made, an act of incorporation was contemplated. I have said, the plaintiffs are bound to know something respecting a company with whom they contracted. A company enter into articles and appoint an agent; they propose to do a certain business in a certain way: he who contracts with their agent shall not shut his eyes and say that he did not know anything of them or their plans or designs. In point of fact, no man ever does enter into such a contract as the present without full inquiries and minute information. I would then take it, the intention to procure an act of incorporation, and the fact that one had been procured, was either to be taken by us as known to the plaintiffs before they did the work; or if not so, is a fact to be submitted to a jury who may try the cause again. All

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the labour was performed for the corporation, none of it for the company, before the act of incorporation.

If we say, the fact that they intended to become incorporated was known to the plaintiffs when they contracted, or that it was known to the plaintiffs before they performed the labour, that the company was incorporated, and the labour with such knowledge, was performed, not for the individuals, but for the corporation, in my opinion, the individuals are not liable. I use the word company, in relation to the situation of the parties, before the act of incorporation, and the word corporation I apply to them afterwards. Though the contract was with the company, no work was performed for the company. On what principle, then, can they be sued for the services performed not for them, but for others. In point of fact, as well as of law, the company and corporation were composed of different persons. After the act of incorporation, the shares of those who neglected, or refused to pay, were forfeited. If the plan had succeeded, were they bound to pay, though they could not receive? It is true, a man may bind himself to pay for work to be performed for another; but this must distinctly appear, or he is not bound. A man may contract with a mechanic to build a house on a lot, at some future time; before that time he sells the lot. The mechanic knows this; the purchaser furnishes the materials, and makes payment to the mechanic. Can he, if the purchaser fails, go back and recover from the first contractor, who got no benefit? Would it not be left to a jury to say whether the contract with him who sold was at an end, and a new one made, express or implied, with the present owner of the lot, and if they found such new contract either express or implied, would any tribunal permit the mechanic to renounce that, and recover from one who got no benefit?

*I have said this much independent of the act of incorporation, which enacts as follows: [*368]

[His Honour here read the second section of the act.]

I do not say, if a contract had been made by the company, and executed by the contractor for the company, before the incorporation, that this act would release the individuals or that it would not. This is not that case. But I do say, that where a contract is executory, and not yet commenced, an act of assembly may render it unlawful to perform it in any way; or it may direct, that if performed, it shall be in a way different from that agreed on. Both these have been done in acts relating to banks, and rightly done. Again, if the legislature can change the property of a company, or can take it from the individuals, and vest it in the corporation, can it not transfer the contracts relating to that property, and the liability on those contracts, and

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place them on the same body who have become owners of the property, and who will have the benefit of the contract? Can it take away the property, and take away all benefit from contracts to be performed, and leave those liable who have not the property, and do not derive benefit from the performance of the contracts? Those who say the last is constitutional and the first not, must have strange notions of the meaning of that word.

If a consignee of goods engages a carrier to bring them to him, he is liable for the price of carriage; but if the vendor follows the carrier, and stops the goods *in transitu*, and receives them from the carrier, he, and not the consignee, must pay the carrier. This, by common law, which is common sense and justice. An act of assembly, directing the same thing, would, by some people, be called unconstitutional. I shall not, for I do not pretend that I can, pretend to draw any precise line, distinguishing, in all cases, what is, or is not constitutional. This, however, may be said, that a law which produces no injustice—which does not destroy a vested right, but only modifies the effect of and remedy on a contract, is not unconstitutional.

The plaintiffs had their option to proceed and perform this contract, after the law, for the corporation, and to look to them for compensation, or to decline the contract, and sue the company for damages for disappointment; but are forbidden by the law, and by common justice, to take this course. They cannot have recourse to the company, for they did not labour for them, and must claim under the corporation, for they did labour for them, and if so, cannot demand pay from the company.

Let me not be understood as giving a final opinion in this matter; as it comes before us now this court are to decide facts and law. As it will probably be tried next time, the jury ought to find whether the plaintiffs had knowledge of the act of incorporation, and if they believe there was notice of it before the labour was performed, then, in my opinion, the law will be as above stated.

[*369] *We have so many banks and other corporations, who began as companies, and were afterwards incorporated, and so many corporations whose charters have been, and are daily changing, that the effect of the clause in question is very important. I have thought of it, and I see no objection to allowing the power of the legislature, and the effect of the act of incorporation, so far as respects all contracts, to be entirely carried into effect for the benefit of the corporation. If the party performs for the corporation, the corporation is liable, and is alone liable. If the party is not willing to perform and look to the corporation, let him at once stop. I think that principle is the foundation of our decision in *Ehrenzeller v. The Union Canal Company*, 1

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Rawle, 181; and that case goes farther than my opinion in this. In that case an indefinite employment was at once put an end to by the act of incorporation.

ROGERS, J., was against the new trial on both points. SMITH, J., concurred with the Chief Justice. TOD, J., took no part, having been indisposed at the argument.

New trial awarded.

Cited by Counsel, 1 Penn. R. 249, 443; 9 W. 99; 5 Barr, 222; 9 C. 104; 3 G. 108; 1 Wright, 213.

Approved, 5 Barr, 222.

Cited by the Court, 2 R. 265; 2 W. & S. 209; 14 Wright, 483.

[PHILADELPHIA, JANUARY 28, 1830.]

The Commonwealth *against* M'Closkey and Others.

Under the act of assembly of the 24th of March, 1812, incorporating the township of Moyamensing, the three commissioners elect, are not competent to take part in deciding on the validity of their own election.

It is illegal, under the provisions of that act, for the commissioners elect to be sworn in before their election has been returned and approved.

Though the act of incorporation constitutes the commissioners whose term had not expired, judges of the election, and gives them full power and authority to approve thereof, or to set aside the same, and order a new election, as the law may require, yet, the superintending jurisdiction of the Supreme Court is not thereby ousted; but they may inquire into the legality of the proceedings of the commissioners in setting aside an election, by granting an information in the nature of a writ of *quo warranto*.

The commissioners have no right to set aside an election as to those persons who had a clear majority after deducting illegal votes.

THIS was a rule to show cause why an information in the nature of a writ of *quo warranto*, should not be filed against the defendants, James M'Closkey, John Paisley, and David Farrell, to inquire by what authority they exercised the office of commissioners of the township of Moyamensing, in the county of Philadelphia.

The facts upon which the argument was had, were briefly these:—

The legislature, by an act of assembly, passed the 24th of March, 1812, incorporated the inhabitants of the said township by the name and style of "The commissioners and inhabitants of the township of Moyamensing." Nine persons are required to be elected, who *shall constitute the Board of Commissioners, and on the third Friday in March, in [*370] each and every year, the citizens qualified to vote for members of the general assembly, are authorized to elect three commis-

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sioners, to serve three years respectively. The third section of the act of incorporation provides, that "the three persons who shall at every subsequent election have the highest number of votes, for the said office of commissioners, together with the six commissioners, whose time shall not have expired, shall meet at such place as shall be legally appointed, between the hours of two and four in the afternoon on the first Monday of April next following each and every election, to be held in pursuance of this act, and shall then and there receive the said return of commissioners elect, and shall forthwith proceed to examine the same, and to judge and determine thereon; and for that purpose, the said commissioners, or a majority of them, shall be judges of the said election, and shall have full power and authority to approve thereof, or to set aside the same, and to order new elections, as the case may require, to be held in the manner hereinbefore directed, and at such times as shall be by them appointed, of which they shall give at least six days previous notice, by handbills posted up in at least ten of the most public places in the said township."

The fifth section provides, that "every commissioner who shall be elected and returned, and whose election shall be approved in manner aforesaid, shall, before he enters on the exercise of his said office, be sworn or affirmed before some justice of the peace of the county, well and faithfully to execute the office of commissioner of the said township; and shall, thereupon, without any further, or other commission, enter upon the duties thereof, and shall hold and exercise the same for the term for which he shall have been elected as aforesaid."

On the 20th of March, 1829, an election was held in the said township, for three commissioners to serve for three years. The judges of the election made return, that the three defendants above named, had the highest and greatest number of votes, and were duly elected. It appeared, that Paisley had two hundred and seventeen votes, M'Closkey one hundred and fifty-three votes, and Farrell one hundred and fifty votes. It was likewise given in evidence, that three other persons were voted for at the said election, and that the highest of the three, viz., James Ronaldson, had one hundred and forty-seven votes.

On the first Monday of April, succeeding the said election, the Board of Commissioners were convened, agreeably to the provisions of the act of incorporation. Five of the six commissioners, whose time had not expired, were present, and one was absent. A memorial, signed by fifteen inhabitants of the said township, complaining of corruption and illegality in the said election, was presented to the Board. The memorial was accom-

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panied by depositions, tending *to prove, that three illegal votes had been taken; and an offer was made to [*371] prove other illegal votes.

It appeared, that the three commissioners elect, had been sworn into office, previously to the meeting of the Board, on the first Monday in April, 1830. When the Board met, the three commissioners elect insisted on voting to approve of their own election. Two of the remaining five commissioners asserted the right of the three commissioners elect to vote, and the other three protested against it. The Board divided, and formed two separate boards. The three commissioners elect, and two of the remaining commissioners, constituted themselves a board, and organized themselves by the election of officers. The other three remaining commissioners, together with the one who was at first absent, but afterwards attended, and acted with the last named three remaining commissioners, organized themselves into another Board.

The Board, composed partly of the commissioners elect, refused to permit the memorial, and the documents accompanying it, to be read. The other Board, consisting of the four old commissioners, received them, and notified the defendants to appear on the 15th of April, inst., when they would proceed to examine into and determine the validity of the said election. The commissioners elect did not appear, as directed, and the Board proceeded to hear the petitioners and their proofs, and declared the election void, and ordered a new election to be held on the 23d day of April following. An election was accordingly held, at which James Ronaldson received one hundred and sixty-one votes, and Robert Thornton and Samuel Parker received one hundred and sixty-one votes each, and were declared duly elected, the opposite party not participating in the last-mentioned election. The four old commissioners, above mentioned, received the return of the last election, and admitted the persons elected as members of the Board.

The question to be decided by the court was, the right of the defendants to act as commissioners.

The case was argued by *J. Randall* and *P. A. Browne*, for the relators, and by *Dallas* and *Binney*, for the defendants. A general examination of the different acts of assembly, incorporating cities, boroughs, towns, and districts, throughout the state, was gone into, in the course of the argument.

The opinion of the court was delivered by

ROGERS, J.—On the 20th of March, 1829, the respondents were elected to serve for three years, as commissioners of the

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township of Moyamensing. It appearing, at the close of the polls, that they had the highest number of votes, and the judges having given them notice of their election, on the 2d of April, 1829, they took the oath of office. The judges, in pursuance of the second section of the act of incorporation, returned the respondents as duly elected. Before the meeting of the commis-
[*372] sioners, which is directed to be on *the first Monday in April, a memorial, respectful in its terms, was prepared and signed by a number of the legal voters of the township, alleging, that sundry abuses were practiced, and many votes taken of persons who were not citizens qualified to vote for members of the general assembly, and praying, that the abuses may be inquired into, according to law; and they annex to the memorial, evidence of the illegality of three votes. At the time appointed for the meeting of the commissioners, viz., the third Monday of April, present Edward Smith, Jacob Thomas, Robert M'Affee, Samuel Bell, George Kirkpatrick, commissioners, and the defendants, John Paisley, David Farrell, and James M'Closkey, commissioners elect. Edward Smith stated, he wished to lay before the Board, a remonstrance, contesting the election. The remonstrance was not suffered to be read, nor was any vote taken on it, but it was ordered to lie on the table, by George Kirkpatrick, who had been elected president *pro tem*. The returns of the election were then read, whereon it appeared that John Paisley had two hundred and seventeen votes, James M'Closkey had one hundred and fifty-five votes, and David Farrell had one hundred and fifty votes. There is, then, this entry on the minutes, "adopted by the majority of the Board;" which, although informal, amounts in substance, to an approval of the election of the respondents. Edward Smith, Jacob Thomas, and Robert M'Affee, were opposed to the approval. The oath of office of the commissioners elect, was then read, together with a notice of their election. The Board, viz., the commissioners elect, and two of the commissioners of the old Board, went into an election for president, and other officers; Jacob Thomas, Edward Smith, and Robert M'Affee, refusing to take any part in the proceedings. The 10th of April, 1829, at a special meeting of the commissioners, present Edward Smith, Jacob Thomas, Thomas Query, and Robert M'Affee; Mr. Query presented the memorial of sundry inhabitants, complaining of certain abuses practiced at the election, held on the 20th of March, which being read, on motion, it was resolved, that on the 13th inst., they would inquire into the abuses complained of in the memorial; and, on the 13th inst., (having previously given notice to the respondents, who did not attend,) they did inquire, set aside the election, and ordered a new election to be held on the 23d of

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April, inst., which resulted in the choice of James Ronaldson, Robert Thornton, and Samuel Parker, whose election was approved by the four commissioners above stated.

This is an application in the case of a public corporation, for a rule to show cause, by what authority the respondents claim to exercise the duties of commissioners of the township of Moyamensing.

The question arises on the third and fifth sections of the act of assembly of the 24th of March, 1812, entitled, "An act to incorporate the township of Moyamensing, in the county of Philadelphia."

From the facts which have been disclosed, it is apparent, that the *approval of the election of the respondents, depends altogether on their own vote, and that independent [*373] of that vote, there had not been that confirmation of the election, which is required by the act of incorporation. The inquiry will then be, to which all others are subordinate, in some measure, whether the act of assembly authorizes this proceeding on the part of the commissioners elect; whether each of them who have been returned elected, are entitled to judge of their own election, with full power and authority to approve thereof.

It will be conceded, that where it can be avoided, no man should be permitted to decide his own cause; nor can I perceive much difference, where he is called on to determine his right to an office of profit, or one of trust, accompanied as this, with extensive patronage. The temptation to an abuse of the trust is as great in the one case as the other; and is such, that no prudent legislature would intrust such a power to any person, unless in case of necessity; and where such necessity exists, the legislative grant would, we should be led to suppose, be in such clear, unequivocal terms, as to leave room for neither doubt nor cavil. In England, it is said, that even an act of parliament, made against natural equity, as to make a judge in his own cause, is void in itself; for as it is expressed, *jura nature, sunt immutabilia*; and they are *leges legum*. *Davy v. Savage*, Hob. 87. And in 12 Mod., if an act of parliament should ordain, that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament, for it is impossible, says the court, that one should be judge and party; for the judge is to determine between party and party, or between the government and a party; and our own courts appear equally averse to the introduction of such a principle.

An act of the legislature, says Justice Chase in *Calder and Wife v. Bull*, 3 Dall. 386, contrary to the great first principle of the social compact, cannot be considered a rightful exercise

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of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A law that punished a citizen for an innocent action, or in other words, for an act, which when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause, or a law that takes property from A. and gives it to B., it is against all reason and justice, for a people to entrust a legislature with such powers; and therefore, it cannot be presumed, they have done it. The genius, the nature, and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason failed there. To maintain, that our federal or state legislatures possessed such powers, if they had not been expressly restrained, would be a political heresy, altogether inadmissible in a republican government. To these high and imposing authorities, [*374] I may add the opinion of the present Chief Justice, in *The Commonwealth v. Woelper et al.*, 3 Serg. & Rawle, 43, which it is a mistake to suppose was overruled or contradicted, by the other members of the court.

In this view, the right claimed by the respondents, struck the judicial mind in England and in this country, and particularly the powerful intellect of Justice Chase. Although I fully accede to the general principle of that distinguished jurist, yet I should pause before I would carry it to the extent he seems willing to go. If the legislature should pass a law in plain, unequivocal, and explicit terms, within the general scope of their constitutional power, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well being of society, or at least, not in harmony with the structure of our ideas of natural government. Justice is regulated by no certain or fixed standard, so that the ablest and purest minds might sometimes differ with respect to it. Besides, necessity dispenses with those general principles, and the legislature must be the judges when the necessity exists—when the exigencies of society require the investment of such extraordinary powers. It must undoubtedly rest in their wisdom, to determine when the public welfare, to which all else must be subservient, requires the assumption of such principles. Whilst I, then, in some measure, disclaim the doctrines of that eminent man, yet, the laws have a right to claim the benefit of another

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principle of construction. Unless the words of the act be plain and explicit, the court is bound, in decency, to conclude, that the legislature had no intention to violate the principles of equity, or without necessity, to contravene the first principles of the social compact: That, as it is against reason and justice, and the fruitful source of faction, corruption, and abuse, that a party interested, should judge his own case; it is not to be presumed, but directly the contrary, that the legislature have invested the respondents with such extraordinary powers.

I have looked in vain into the third section, which has been mainly relied on by the respondents, for any express words, or necessary implication, authorizing the commissioners elect, each in his own case, to examine and judge of the election. The legislature had in view the original organization of the corporation, and its continuance, by the election of three members each year, to supply vacancies occasioned by the rotatory principle provided by the act. Hence, an ambiguity has arisen in the phraseology of the act, from not accurately distinguishing the manner of proceeding at this period, which are so essentially different. From necessity, at their organization, they may be permitted to verify their own powers, *and perhaps without the sanction of an oath; but even then, this may be done, without violating a principle of American as well as English jurisprudence, founded in rational equity, and laid down by eminent jurists, as an acknowledged principle of universal law. Each one must be permitted to vote in the cause of his fellows, but not in his own. The election of one of the nine, might be well questioned, without interfering with the right of the others. [*375]

After the corporation has been called into being, no necessity can ever be pretended; as then there are persons acting under the sanction of an oath, competent to decide upon the conflicting claims in a contested election.

The third section provides, that the nine persons who shall at the next election, to be held in pursuance of this act, have the highest number of votes for the office of commissioners, shall meet together, &c., on the first Monday in April next following the election; and that the three persons who shall, at every subsequent election, have the highest number of votes for the said office of commissioners, together with the six commissioners, whose time shall not have expired, shall meet together, at such place as shall be legally appointed, &c., on the first Monday of April next following each and every election, to be held in pursuance of this act; and shall then and there receive the said returns of commissioners elect, and shall forthwith proceed to examine the same, and to judge and determine thereon; and for that purpose, the said commissioners so met, or a majority of

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them, shall be judges of the said election, and shall have full power and authority to approve thereof, or to set aside the same, and to order new elections, as the law may require, to be held in the manner hereinbefore directed, and at such times as shall be by them appointed, &c.

The fixing a particular day for the meeting of the commissioners and the commissioners elect, is necessary, because, in case there should be no dispute, the members of the Board would be in attendance, and in readiness to enter upon the discharge of the duties of their office; and in this point of view, it was a prudent precaution. As the scrutiny into the qualification of voters is usually made at the polls, the examination of the returns, and the approval of the election is, in a great majority of cases, a matter of form. But where there is reason to believe, that the returned members have not been duly elected, it becomes a different affair. There another, and a more careful scrutiny takes place, before a tribunal on whom devolves a most important duty, to examine, judge, approve or set aside the election. The act says, "and for that purpose, the said commissioners, so met, or a majority of them, shall be judges of the said election;" that is to say, for the purpose of examining, and judging, the commissioners shall be the proper tribunal. What then do the legislature mean, by the terms, the "commissioners so met"? In my judgment, they intended to designate commissioners in the strict and legal sense of the word.

[*376] Who, then, is a commissioner? *No person can be considered as such until he is duly qualified to perform all the duties of the office; and this can only be when he has been elected, returned, his election approved, and when he has duly taken the oath of office. The "commissioners so met," means the commissioners whose time has not expired, in exclusion of the commissioners elect; and in aid of this idea, it would seem, the legislature has discriminated, although not in very plain terms, between commissioners and commissioners elect. If the legislature intended otherwise, it would have been very easy to have expressed their meaning in such precise and definite terms, as to have avoided all difficulty. Not having done so, we feel ourselves at liberty, nay, bound in common decency, to suppose they did wish to be so understood. We are authorized to believe they did not intend to contravene a principle, which has been deemed by the most eminent jurists, contrary to natural equity, and the first principles of the social compact. On the contrary supposition, the approval of the election, would be a mockery, as we could not suppose, particularly with the knowledge of the facts which have been disclosed, that an interested party, under the influence of irritated and party feelings, could

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bring to the examination that impartiality which is necessary to a proper and correct decision. We exclude a juror or a witness when he is interested, and much more so ought we to guard from pollution the determination of the most sacred right, the republican principle, which has been engrafted into this state, that it is the majority of legal voters who shall confer the office.

If the question, then, depended entirely on the third section, I should say, the commissioners elect, had no right to vote, when their own election was in dispute. But this is rendered still more plain by the fifth section, which provides, "that each and every commissioner who shall be elected and returned, and whose election shall be approved in manner aforesaid, shall, before he enters on the execution of his said office, be sworn or affirmed before some justice of the peace of the county, well and faithfully to execute the office of commissioner of the said township; and shall, thereupon, without any further or other commission, enter upon the duties thereof, and shall hold and exercise the same for the term for which he shall have been elected as aforesaid."

The oath of office was administered to the respondents before the election was approved, and even before the return of the election, although after they had received notice from the judges. I do not perceive why the justice might not as well have sworn them in when they were put in nomination, on the ground of the certainty of their election, and the presumption, that the election would be approved. It would no more have been a violation of the letter, and, I believe, the spirit of the act, in the one case, than in the other. The section provides, that the commissioners shall be elected and returned, and approved, and then sworn. And this is the natural order of proceeding. First we have the election, *then the judges return the highest in vote, after which, the legal tribunal approves [*377] or sets aside the election; and if the election be approved, then, and not until then, the person who has been elected, returned, and approved of, shall be sworn, well and faithfully to execute the office of commissioner of the township, and shall, thereupon, (that is to say, after his election shall have been confirmed,) without any further or other commission, enter upon the duties of his office.

But what are the duties of the office? The first duty a commissioner has to perform on the meeting of the Board in every year, is to examine, to judge, and determine on the election of such members as may be returned by the judges, to supply the vacancies in the Board.

If then, I am right in supposing, that the oath ought not to be administered to the commissioners elect, until their election

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be confirmed, it is a strong argument to show, that the legislature did not intend that they should take any part in the inquiry, when it ceases to be matter of form, and becomes matter of substance, by the presentation of a respectful memorial, complaining of an undue election. Surely, it was not contemplated, that some should act with oath, and others without oath; and that those who had not been sworn, should be the persons, who were interested in the decision. When the respondents claim the privilege of voting, it is reasonable to object, that they cannot vote without having taken the oath, and that the oath cannot be lawfully administered until the approval of the election, by the tribunal legally constituted for that purpose.

The constitution of the United States prescribes, "That each house shall judge of the elections, returns, and qualifications of its own members." The constitution of Pennsylvania, in nearly the same words, "That each house shall judge of the qualifications of its members." The right of determination is given to the house, who exercise their authority by the decision of the majority, as in the act it is vested in the commissioners, or a majority. Under these different provisions, no instance can be produced, either in congress or our state legislature, where such a right has ever been permitted, or even claimed. The nearest they have ever gone to it in congress was, where returned members voted on a principle, on which their own election depended; a case entirely different from this, and the propriety of which, might be well questioned; at any rate, I feel but little respect for a decision which comes in such a questionable shape.

However this may be, we know this cannot occur in our state legislature, for by the act of the 29th of September, 1797, upon a petition, signed by twenty qualified electors, complaining of an undue election, being presented to the senate or house of representatives, they select a committee, appointed by lot, in the manner pointed out by the act, to determine the contested election, whose report, when entered on the journals, is final and [*378] conclusive; and so far *from the person whose election is contested, being entitled to vote, the returned member, and the candidate next highest in vote, are made parties in the trial. We must, therefore, seek in vain for any analogy to the present proceeding, in the constitution of the United States and of this state, and the practice which has obtained, in congress and our state legislature.

In the warmly contested election for Westminster, in 1784, Mr. Kenyon, afterwards Lord Kenyon, denied the right of Mr. Fox, who at the time was a member for a small borough in the Orkneys, of being present during the discussion, and asserted, that even hearing him was an indulgence. Against the principle

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of the assertion Mr. Fox directly protested, maintaining, that he had not only the right to speak, but a positive and clear right to vote. This claim he grounded on the fact, that he was a member of parliament, and he was advocating the right of the electors of Westminster, rather than his own pretensions.

To admit, whether this, as has been insinuated, is any authority in favour of the respondents, particularly, taken in connection with the fact, that he neither voted, nor offered to vote.

The respondents have relied on several acts of assembly, wherein they state, similar powers have been conferred by the legislature. If the acts of assembly are the same as in the incorporations of the district of Southwark and the Northern Liberties, it proves nothing more than that our decision may affect more than the township of Moyamensing; and is, of course, as we are well aware, an important question. They, however, shed no light on the construction of the act, unless the counsel had, in addition, shown an adjudication in accordance with the rule for which they contend. If different, I cannot perceive they are entitled to the slightest weight. It will, however, be seen, by reference to those acts, that the legislature have not, even in terms, departed from the principles which I have advocated. That the provisions of the act may not be ineffectual, they have made them judges of their own election. The legislature by no means say, that a member of council shall, or may vote, when his own election is contested, but, that the common councilmen, or a majority of them, shall exercise that right; a principle, similar to that which has been introduced into the constitution of the United States, and this state. If the right of one, or two, or more, was disputed, it would be very clear to me, that the interested party could not interfere in the decision. And even, if the election of the whole of them was in contest, they might, and I think, ought, as in the case to which I have alluded, vote on the principle, without each one voting directly in his own case; and even this could be only justified on the plea of necessity, to prevent a failure of the act of incorporation. For a man to constitute himself a judge in his own cause, is indelicate and indecent. It is not necessary, to prevent a failure of the corporation, nor is it within the spirit or words of the act, which gives the decision to the councilmen, *or a [*379] majority of them, who are authorized to judge of the election of their own members. The legislature have been cautious, not to extend the power further than the necessity of the case may require, and within these limits they may be allowed to act; and unless the legislature expressly say otherwise, they shall not be permitted to go, with my consent, a step further.

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But it is said, the power may be abused, and of this, if we could have had any doubt before, we have been abundantly satisfied by the facts which have been disclosed in this investigation. If, however, they have acted corruptly, they are amenable to the laws, and to the opinion of their fellow citizens, which, in most cases, may prove a sufficient restraint. It is also, equally within the limits of probability, that the judges of the election may be within the sphere of the same corrupt and factious influence, by which they may be induced to make an improper return; and if the returned members may be permitted to confirm their own election, it would lead to equal if not greater mischief.

If, then, this matter rested here, I should have no difficulty in saying, that the rule should be made absolute. But, as has been already stated, at a special meeting of four of the commissioners, they undertook to set aside the election, and order a new election, which resulted in the choice of three other gentlemen, to supply the vacancy in the Board. At the first election, it appeared, that John Paisley, had two hundred and seventeen votes, James M'Closkey, one hundred and fifty-five votes, and David Farrell, one hundred and fifty votes, whereas the highest of the other candidates had but one hundred and forty-seven votes. Two questions, then arise: 1st, Have the commissioners power to decide, without examination or control, by the Supreme Court? and, 2d, If we have power to interfere, is this such a case, in which it is the duty of the court to interpose, in consequence of an improper exercise of authority by the commissioners?

The act says, that the commissioners, or a majority of them, shall be judges of the election, and shall have full power and authority to approve thereof, or to set aside the same, and to order new elections, as the law may require. From this, it has been inferred, that the court are ousted of their jurisdiction. By the act of the 22d of May, 1722, the Supreme Court have full power and authority to issue forth writs of *habeas corpus*, *certiorari*, and writs of error, and all remedial and other writs and process; and, generally, they are empowered to minister justice to all persons, and to exercise the jurisdictions and powers, &c., as fully and amply, to all intents and purposes whatsoever, as the justices of the Courts of King's Bench, Common Pleas, and Exchequer, at Westminster, or any of them may or can do. This is a great, full, and plenary power to the court, wisely intrusted to them for the public welfare, and which we are bound to exercise, on the complaint of persons aggrieved.

[*380] Under this law, the Supreme Court have been in the
*constant practice of granting informations in the na-

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ture of a writ of *quo warranto*, for exercising an office, in a private as well as a public corporation, not by force of the statute of 9 Ann. ch. 9, but by power derived from the common law. As the jurisdiction of the court has been expressly granted, it cannot be taken away except by express words, or necessary implication, neither of which appears in this act.

When the legislature give full power and authority to approve or set aside an election, I cannot believe that they intended that the supervising jurisdiction of the Supreme Court should be taken away. These words cannot have greater effect than the words, "final and conclusive between the parties," used in a great variety of acts of assembly; and, yet, it is a well-settled principle, that these expressions do not take away the jurisdiction of the court. The legislature being aware, that this is a well-settled rule of construction, would, if they had intended to preclude inquiry, have prevented this court from exerting their superintending authority by express prohibition. This case furnishes a reason against the placing or putting public or private corporations above the reach of inquiry.

And this leads to the second question, whether there was a rightful exercise of authority in setting aside the election of the respondents. As respects Mr. Paisley and Mr. M'Closkey, there cannot be the slightest particle of doubt. Mr. Paisley had a majority of seventy, and Mr. M'Closkey a majority of eight votes. How the commissioners could have supposed they were justified in setting aside their election, on the proof of two, or at the most, three illegal votes, passes my comprehension. I see no reason for supposing that the judges of the election were corrupt, although they may have been mistaken. Edward Smith, one of the commissioners, says, that they inquired into the circumstances of the election, held on the third Friday of March. Witnesses were examined by the commissioners, on the subject of the election. It was proven, that persons had voted at that election, who were not entitled to vote, persons who did not reside in the township, and persons who were not authorized to vote in the township. By the latter description, he says, he means aliens. In his cross-examination, he says, they made no inquiry as to whom they voted for. Robert Parker, an alien, voted. He was qualified in the presence of the commissioners, that he had voted, and that he was an alien. John Woods and Daniel Daniels voted. These were all it was proven against, that he recollects. Although it is clear, that the two first were duly elected, yet there is some difficulty as respects David Farrell; and if they had merely set aside his election, we should not have been disposed to interfere. It would appear, that three illegal votes were taken at the election, which being deducted from the high-

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est, which, I believe is the legislative rule, there was an equality of votes. If this be the case, as regards him, there was no election. It is to be regretted, that we cannot set aside the election, as *respects David Farrell, and order a new one, [*381] which might be the means of restoring harmony in the township. As we have no such authority, the rule must be made absolute, as to David Farrell, and refused as to Messrs. Paisley and M'Closkey.

GIBSON, C. J.—This species of information was freely used by the crown in disfranchising most of the corporate towns of England, previous to the statute 9 Ann. 8, 20, which gave no new remedy, but enlarged an existing one, by authorizing it, at the instance of an individual, and allowing costs to the relator or the respondent, according to the event. The circumstance of that statute not being in force here, furnishes no argument against the information as an existing remedy. It is, however, so far modified by usage, in analogy to the statute, as to be grantable at the relation of an individual; but in every other respect, it has been considered to be in force here, as at the common law. It is declared in the constitution, (article nine, section tenth,) "That no person shall, for any indictable offence, be proceeded against criminally by information," except in certain specified cases. But every information is in form, a criminal proceeding; and the framers of the constitution were guilty of pleonasm, unless they meant to assert, that there are cases in which it may be used substantially as a civil remedy. Now, it so happens, that the best of the elementary authors has asserted the same thing. As a method of criminal prosecution, the information in the nature of a *quo warranto*, has long fallen into disuse, the fine being merely nominal, and the effect of the judgment to oust an intruder; and thus restricted, it is now used to try title to a franchise. 3 Comm. 263. In fact, it contains all that is valuable in the ancient writ of *quo warranto*; to which, with its uncouth forms and interminable pleadings, the necessity which there often is, of giving redress in some shape, would compel us to return. Can it be doubted, then, that the convention, containing as it did, many of the ablest lawyers in the state, had particularly in view the preservation of this proceeding as a civil remedy? Even were that doubtful, yet the point has been settled by contemporaneous construction and long practice. The Commonwealth v. Wray, 3 Dall. 490, in which it was expressly ruled, was within nine years from the adoption of the constitution; since when, it has been followed as a precedent, by different judges, through six successive cases, in which the principle was reasserted without the expression of a doubt, either on the bench

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or at the bar ; which ought, one would think, to put the matter at rest. After thirty years' practice, to question a train of authorities such as these, tends to shake all confidence in the stability of judicial decision, and leaves the law, itself, in a state of distressing uncertainty.

In regard to the remaining points, I regret that I am compelled to dissent from the opinion of the majority. The objection, to what appears to me to be the obvious and natural construction of the *third and fifth sections of the act of incorporation, is, that it would make the commissioners elect, [*382] judges in their proper cause. Such a result is forbidden by no clause in the constitution ; but there are various *dicta* in the books, to the effect, that statutes which are against reason or natural justice, are void. Of late, however, the matter is treated more soberly, and it is now considered, that no statute, the meaning of which is clearly and unequivocally expressed, is void either in its direct or its collateral consequences ; in so much, that its effect cannot be questioned, except on a reasonable presumption, arising from the generality of the words, that the actual meaning is different from the literal purport. 1 Comm. 91, note. Such was the case of the legislative grant of power to try all causes within the manor of Dale ; the words of which, might be reasonably satisfied without authorizing the judge to try his own cause. Is there, then, an ambiguity arising from the generality of the words in the sections under consideration ? The first Board of Commissioners were directed to judge of the validity of their own election, in set terms. For subsequent cases, it is provided, that the three commissioners elect, together with the six whose term shall not have expired, shall meet at a time and place to be designated, receive the return of the commissioners elect, examine the same, "and judge thereon ; and for that purpose, the said commissioners so met, or a majority of them, shall be judges of the said election." Now, it seems to me, that grammatical analysis can neither assist nor obscure the meaning of this ; nor does language afford words to express it more distinctly or positively. But it is provided in the fifth section, that "each commissioner, whose election has been approved in manner aforesaid, shall, before he enters on the execution of the said office, be sworn or affirmed," to execute it with fidelity ; and, hence, an argument, that as he cannot perform its duties before his election has been approved, he cannot take part in determining the validity of it, which is as much an official business as any other ; at least, that in the order prescribed, he would perform it before being sworn. It is plain, however, that the duties thus mentioned, are the ordinary and current transactions of the office ; for if the extraordinary business of the election had been

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deemed proper for none but commissioners fully installed, it is not easy to see why the services of those about to retire, should not have been retained for it ; or why they should retire for any purpose, before their successors are ready to take their places. As to the time of taking the oath, there is nothing in the words to prevent it from being administered when the commissioners first take their seats, such being the practice in the legislature, where it is constantly done, even though it be certain, that the election of the member is to be contested. The inquiry, then, seems to be, whether a statute, which authorizes a person to determine a question in which his own rights are incidentally involved, be void, independently of constitutional limitations ; [*383] and I hold it is not. The Commonwealth *v.* Woelper *et al.*, 3 Serg. & Rawle, 43, in which I expressed an opinion, that one who acted as a judge of the election, was *ipso facto*, disqualified from accepting the office, involved no question of the validity of a statute. But it is unfair to treat this as the common case of a judge deciding his own cause. It might have been unsafe to confide the final decision to the commissioners, without infusing into the Board a portion of the popular sentiment that prevailed at the election ; and this was evidently the motive for associating the new commissioners with the old. It is, therefore, not so much their own franchise, as that of the electors on which they were intended to adjudicate. On this distinction it was, that Mr. Fox, (than whom, no man was more profoundly skilled in constitutional principles,) asserted his right to vote in what had been called his own cause, during the debate on the celebrated Westminster scrutiny. But it is demonstrable, that not even the personal interest of the individual, would be promoted by permitting him to vote on his title to the office. Though returned jointly, the commissioners are elected severally ; in so much, that some of them may be elected by illegal votes, while the votes of the others may be above suspicion.

Now, as the Board must necessarily pronounce separately on the election of each, according to its peculiar merits, I can discern no reason on the score of community of interest, to exclude the other two. Then, suppose the Board to be constituted of eight, who are equally divided on the election of the ninth : and the consequence is, that the return would be established for want of being successfully impeached ; because, if that were not so, the new commissioners would neither be admitted nor rejected, nor could a new election be ordered. The vote of the ninth, therefore, could produce no effect, but when given in a way to turn the scale against himself ; and, it seems to me, the public ought not to be deprived of the benefit of that contin-

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gency, however remote it may appear to be. If the eight were divided unequally, the vote of the ninth could produce no effect whatever. Now, strike out all the commissioners elect, and we shall obtain exactly the same results, with the Board constituted of six. The only effect, then, which the votes of the new commissioners can produce, is to prevent a majority of the old Board from controlling the public will—the very point which, it seems to me, the legislature intended to secure.

On the last point, I have the misfortune to differ from all my brethren. By the act of 1722, the powers and jurisdiction of this court, are declared to be the same as those of the King's Bench, which grants writs of *mandamus*, to restore officers of corporations, and freemen wrongfully disfranchised, as well as informations in the nature of *quo warranto*, against usurpers of the franchises of the crown; and, in the exercise of its visitatorial powers, correct abuses by judging of the circumstances and merits of the complaint. But even conceding to this court a concurrent jurisdiction *with the commissioners, yet [*384] the judgment of a court of competent jurisdiction, directly on the point, is, when coming before another court of concurrent jurisdiction collaterally, conclusive of the fact adjudicated. The Court of Common Pleas has concurrent jurisdiction where the cause of action is of less value than a hundred dollars; yet, it would not be competent to re-examine the judgment of a justice of the peace in a collateral proceeding, further than to ascertain the question of jurisdiction. So, the Court of Common Pleas and this court, have concurrent appellate jurisdiction of proceedings, under the landlord and tenant act, and perhaps in a few other cases; yet, after affirmance or reversal in the Court of Common Pleas, there is no means of drawing the matter into controversy here, but a writ of error to that court. In courts of common law, the rule is without an exception. The case of a prisoner remanded on a *habeas corpus*, may be reheard on a fresh writ, but only because the order is not a judgment that may be made the subject of error, or a *certiorari*. This court has, however, not even concurrent jurisdiction. As it cannot take cognizance of the election return before the commissioners have pronounced on it, the original jurisdiction of the Board must necessarily be exclusive. As, therefore, this court has no other jurisdiction of the proceedings of that tribunal, than what it may exercise in respect of the proceedings of every other inferior court from which an appeal is not given, and whose errors are subject to correction only for irregularity, it cannot now pronounce upon the legality of the return: so that, from the principle held by the majority on the main point in the cause, it would seem to follow, that the rule

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ought to be made absolute as to all, whether the validity of the election were competently determined against the respondents by a majority of the old commissioners, or not determined at all. I am, however, for discharging it as to all.

HUSTON, J.—Our ancestors brought with them a portion of the common law and of the common law proceedings, and where we have used the one or the other, it is not for this court to lay them aside without good reason.

Where, however, on trial, either has been found impracticable or useless, I would not adhere to even all those in use; much less would I go back to search for those abandoned in the country where they originated. Where they have been used, but the form of our government, our legislative provisions, and especially the express words of our constitution, forbid a continuance of them, I would suppose we have no power to use them.

Even in England, informations have always been odious, and there they have been forbidden or modified by both legislature and judiciary. Here I have always believed they were expressly prohibited; no person, for any indictable offence, shall be proceeded against criminally by information, “except in [*385] cases arising in the land or naval *forces, or in the militia, when in actual service in time of war or public danger, or by leave of the court, for oppression or misdemeanor in office.” Con. Art. IX. Sect. 10. The first part of the expression in this sentence is not, to me, very intelligible—“proceeded against criminally.” An information is always a criminal proceeding; it differs from an indictment or presentment only in this, that the latter is founded on the presentment of a grand jury, the former is not. It is essentially a criminal proceeding in its form, and in its consequences. The law on it is found in Treatises on Criminal Law. It is always called a prosecution. It is true, it is used to try a right to an office of franchise sometimes, and so is an indictment for a forcible entry and detainer; and so may be an indictment for assault and battery. It is not usual, where it is used to decide a right to impose a heavy fine, nor is it when an indictment is used for the same purpose, “by leave of the court, for oppression or misdemeanor in office.” In such cases, in England, no leave of the court was necessary; nay, it would be refused. The attorney general must proceed, the court will not direct. Here, it is required in those cases, and the cases in which that leave is necessary, in England, are totally forbidden. The leave of the court will only justify it in the cases specified. Oppression and misdemeanor in office are as different in phrase as in meaning, from usurping an office. The first admits the office to be legally held, but goes to punish

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crime in administering it, and is clearly a criminal proceeding; the last denies the person to be an officer, and goes to punish him for assuming an authority not given him by the law, and is as clearly a criminal proceeding. It is indictable, and constantly, as often as it occurs, indicted in every county in the state, and is so in England.

I have said, this power of granting leave to file informations in the nature of *quo warranto*, has been modified in England. The act of 4 and 5 William and Mary, c. 18, compels the persons at whose instance the motion was granted, to enter into recognisance in twenty pounds, to pay the costs in case of *non-pros* or acquittal of the defendant. The act of 9 Ann. c. 20, regulates the whole proceedings, and gives all the costs, though they may exceed twenty pounds, and applies all the statutes of jeofails to these proceedings; these acts are neither of them in force here, and if we grant the information, it is at common law, and the defendants must pay the costs, although they are acquitted. All our acts of assembly relative to costs in criminal proceedings, relate to, and speak of grand and petit juries, and indictments. The legislature were not aware, that informations lay against every officer of every county, township, and borough, and corporation in the state.

An old act of assembly, gave this court power to exercise the jurisdictions and powers thereby granted, as fully and amply to all intents and purposes whatsoever, as the Courts of King's Bench, Common Pleas, and Exchequer, or any of them may or can do. *But in 1791, this was limited to such powers [*386] as may be exercised consistently with the constitution of the state; and many acts of assembly have lessened those powers still more. We have not, as a Supreme Court, the power to summon a grand jury; except that now claimed, we have no original criminal jurisdiction. But this court has decided, that it had this power, and in one instance since I was on this bench. That is not a conclusive reason why it should always decide in the same way, or that I, even if I thought so then, which I did not, should on reflection continue of the same opinion. It was also decided, or said, in that case, that this court had the right of granting or refusing leave to file an information, according to circumstances. The Commonwealth v. Arrison, 15 Serg. & Rawle, 127. And this court has since refused to grant leave in one case, because of the smallness of the corporation. I incline to the opinion that this cannot be supported, and that if we grant it as to the officers of one corporation, we must do it to all. I do not agree that a remedy is open to rich and powerful corporations, and is not to small and poor ones, and that they have no redress in any case of usurpation of their offices

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This is against the letter and spirit of all our institutions. It is said, let them indict whoever usurps an office: it gives up the question. It is then an indictable offence, and our right is forbidden by the constitution; if it is not indictable, we must try all that offer, and we can do nothing else.

But there are other reasons: there is no *Nisi Prius* Court issuing from this court, except in the county of Philadelphia; and no one county has any exclusive rights, or any remedies, except what are given by positive law. All the corporations, all the boroughs, all the counties, then, have not this common law remedy, and every *tontine* establishment, falsely called charitable, must take up our time in trying whether the voters were disqualified by gaming, or intoxication, or having the venereal disease, which are standing disqualifications in all of them. It has been said, we may send the issues to be tried in the Circuit Court, but I apprehend this has been said without reflection: that is a court of very special jurisdiction; all it has is given by act of assembly, and nothing can be found giving us power to originate causes to be sent to that court. Besides, our original jurisdiction is expressly confined to civil suits, by the fourth section of the act of assembly of the 25th of September, 1786, and by the act of assembly of the 20th of March, 1810, confined to suits where the matter in controversy shall be of the value of five hundred dollars; and by the first section of the act of assembly of the 24th of February, 1806, no issue, in fact, shall be tried in bank in the Supreme Court, but only at *Nisi Prius*, and the Circuit Court was in full operation at that time.

This township of Moyamensing is, to be sure, a corporation, but one of a peculiar kind; it is, *quasi*, a county for particular purposes. Informations of this kind have not, I believe, been granted against county or parish officers in England, and I am [*387] not satisfied that we have the power to revise and examine township and county elections, which townships and counties are part of the government of the state, and not the kind of corporations to which this remedy can or ought to be applied. We have no power to interfere or control the machine of government, except it is expressly given us; and are equally prohibited, whether the support of the poor, or the support of the government, is to be affected by our intermeddling. But if we had all the power which the complainants wish, and that power as arbitrary a discretion as they could wish, there is no reason for our interference in this case. If we can be supposed to have any reasonable wish, if any legal object is in view, it must be, that those who were duly elected shall fill the office. The essence of the matter is a majority of legal votes. Now, there

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is not only no proof, that the three men returned as elected on the third Friday of March, had not a majority of legal votes, but, to me, there is conclusive evidence that two of them had, and even that all three had. One of them had seventy votes more than the highest candidate on the opposing ticket, the next had eight, and the third had three more, and yet, all are asked equally to be removed. Now, there is no colour of evidence to affect two, and no legal evidence to put the third to answer. The complainants before us have attempted to prove, that three illegal votes were given. Testimony was taken *ex parte*, on this subject, immediately after the election, and as to one, is at best, doubtful. On the 13th of April, when the four old commissioners investigated the matter, there was only proof of two illegal votes given; yet, they set aside the election of all three respondents. But what is not to be forgotten, one of those commissioners swears expressly, they did not inquire whether those two votes were given for the respondents or not. I do not mean to speak disrespectfully of the institutions of my country, but I say, I believe there never was an election for county officers in any county in this state, at which there was not one illegal vote given. Now, these commissioners went on the ground, that it was not necessary so many illegal votes should be given, that those votes, subtracted from the successful candidate, would put him in a minority. No—one illegal vote, in their opinion, vitiated the election of him who had seventy of a majority, and that, too, without any evidence that, that vote was given for him, or procured by him; nay, I would say, with knowledge, that it was not; for if it could have been proven, that these men voted for the respondents, it would have been. The highest number of legal votes is what decides, and what ought to decide all elections; everything else is form; and when this is ascertained in any contested election in any tribunal of which I have any knowledge, the man having this highest number, is declared duly elected.

If we adopt English forms, let us take English rules of proceeding. There, the court will require the same evidence to support the motion, which would support an indictment; (3 Wilson's Bac. 641,) and if the court are satisfied there is no reasonable cause *for the prosecution, they will not grant the information. Ibid. It is not granted, except upon [*388] affidavit, stating facts, which if true, doth, for its enormity or dangerous tendency, seem proper for the most public prosecution. 2 Hawk. P. C. C. 26, Sect. 8. If the object is to try a civil right, which has not been determined, or if the complaint is vexatious, &c., it will not be granted. Ib. Sect. 9. The court will be guided by the fairness and merits of the party

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applying. *Rex v. Miles*, 1 Stark. 468; 3 Wilson's Bac. 641, and cases there cited.

Now, will this court grant an information against any officer, no matter what his majority, if one or three illegal votes are proved, and must not an application for such prosecution be necessarily vexatious, where, if all that is alleged is true, there is still a majority of sixty-seven? or, can the commissioners, who, without proof, and against proof, set aside the election of the two highest, have any merits on their side, or have they given evidence, of any wish or intention to regard law or justice. It is, however, said, that we have nothing to do with the election; that after the election is over a return is to be made to the commissioners in office, and to the three newly elected; and that the old commissioners alone have the power of approving or disapproving, and that the act of the majority of the old commissioners is binding on this court, and all the world, no matter how flagrantly absurd or wicked it may be.

The township was incorporated by the act of assembly of the 24th of March, 1812. 5 Smith's Laws, 341. The third section is as follows:—"The nine persons who shall, at the next election to be held in pursuance of this act, have the highest number of votes for the office of commissioners, shall meet together at the house where the regulators for the northern district of the said township now meet, between the hours of two and four o'clock in the afternoon of the first Monday in April next following the said election, and that the three persons who shall at every subsequent election, have the highest number of votes for the office of commissioners, together with the six commissioners whose time shall not have expired, shall meet together in such place as shall be legally appointed, between the hours of two and four in the afternoon on the first Monday in April next following each and every election to be held in pursuance of this act, and shall then and there receive the returns of commissioners elect, and shall forthwith proceed to examine the same, and to judge and determine thereon: and for that purpose, the said commissioners so met, or a majority of them, shall be judges of the said election, and shall have full power and authority to approve thereof, or to set aside the same, and to order a new election, as the law may require, to be held," &c. "As the law may require?" do not these words control the authority to approve or set aside, and if we have any power in the matter, authorize us to examine and decide whether the law required the commissioners to do what has been done in this case?

[*389] *But to go to the construction of the whole sentence, for the section is but one sentence. Clearly, after the first election, the nine commissioners had, under this law, to re-

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ceive the return, to judge, and determine, and approve of their own election, or set it aside and order a new election, as the law might require; and as clearly, if resignations, removals, or deaths, should, at the end of any year, leave the township without any commissioners, the nine then elected must also decide on their own election. In ordinary cases, leaving out words of circumstance of time and place, the sentence stands. The three persons who shall have the highest number of votes, and the six old commissioners, shall meet together and receive the returns of the commissioners elect, and shall forthwith proceed to examine the same, and judge, and determine thereon. So far, no ingenuity can raise a doubt; the whole nine are to be together, to receive the returns, and to judge and determine thereon. The sentence proceeds, and for that purpose, the said commissioners so met, or a majority of them, shall be judges of the said election, and shall have full power and authority to approve thereof, or set aside the same, &c., &c.

For that purpose—although they all, or some of them, may never be commissioners for any other purpose, yet, for the purpose of judging and determining, the law gives them this special power. The said commissioners so met. The preceding clause had told most explicitly who were to meet, and who were to judge and determine, and this one says, the said commissioners so met, are to approve or set aside.

The counsel for the relators says, the word, commissioners, in the last clause, distinguishes those who were previously in office, from the three commissioners elect. In the first place, this was not the meaning after the first election, when all were commissioners elect; and it would not be the meaning, if any event should require the election of nine, and the law makes no discrimination between those cases and the election of ordinary years. And in the next; the whole nine, in all cases, are to receive the returns, and judge and determine thereon; and it would not be very easy to find why nine should judge and determine on a matter, and yet, six, or a majority of six, should reverse that judgment and determination; why nine are to judge and determine, and yet, in the same sentence, four of the same men are to have full power to reverse that judgment and determination.

We are told, however, that it is unconstitutional, nay, much worse than that; to appoint any person a judge in his own cause, that even a parliament, whose power of legislation has no limits, cannot do this. Then, the charters of Philadelphia, Pittsburg, and Lancaster, are all void, for the branches of those corporations have that power expressly, and exercise it every year. Oh! but this is from necessity. What necessity?

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[*390] Might not the aldermen *of those cities, or the Court of Quarter Sessions, or the Court of Common Pleas of the counties, receive and judge of the returns? There is no more necessity in those cases than in this; nor anything more unreasonable in this than in that of the common and select councils; or, than in giving in this Moyamensing corporation, the whole funds to the commissioners, with no accountability to any other body. The words, void, unconstitutional, beyond the power of the legislature, &c., &c., are used so indefinitely, as to produce no other effect than to lengthen a speech by supplying the place of precise argument; and the phrase, "judge in his own cause," seems to be often totally misunderstood. As to right to property, a man cannot be a judge in his own cause. As to political rights, the phrase cannot, perhaps apply; the saying is seldom true. Every judge in the state is judge of the legality and extent of his own power; in this respect, the decisions of inferior courts are subject to revision. That of this court is not. If this court was extinct by law or the change of the constitution, and a new court organized under commissions from the same source, in the same form, and of the same date, it must judge of its own rights to the power of office, and the emoluments of office.

When a right to an elective office is questioned, two rights are questioned, that of the person elected, and those of the electors. If the inhabitants of a district elect a man, to whom they confide the power of taxing and applying the taxes, is it strange, they should confide to the same person the power of judging for the same period of their right to vote? There is, and must be, in all free governments, much depending on the confidence of those who elect: and they elect with a view to all the authority which the law gives to the officer, because, they are willing to confide it all to his honesty and capacity. When it is found all cannot be safely trusted, a law divides, gives part to some other hands. The constitution, itself, gives to each branch of the legislature the right to judge of the elections of its own members. If one illegal vote in a county makes an election void, every one in the house is judging in his own case; and if the matter is so bad, or so wicked, as is pretended, we must amend the constitution, and provide, that each branch shall not judge of the election of its own members, but may of the members of the other branch. There is no weight in this objection against a positive law; and if the law were as contended for, it would in no respect mend the matter. Not practically, for if the three newly elected were sole judges of their own election, no more objectionable decision could be given, than has been in this case. Nor is it more free from objection on another ground, for if the six can set aside

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one election without reason, and against reason, they may do so as often as an election is had, and keep the power in their own hands, which is as much judging in their own case, as that objected to.

*As to the time of administering the oath. Some of the English cases are very strict, but that is generally, if not [*391] always, where a particular person is to administer it; and it seems to be held, in some one or two cases, that a literal compliance is necessary, even though a man would have to be sworn in before himself. The act in question is section fifth: "That each commissioner who shall be elected and returned, and whose election shall be approved of in manner aforesaid, shall, before he enters on the execution of his said office, be sworn before some justice of the peace," &c., &c. If we consider the act of judging and determining on the election as a personal trust, given to the three who are returned, which they are to exercise, though they may never be commissioners, then the oath would be more proper after; but the time when it is to be taken is not expressly specified. The oath does not confer the office. The commissioner is to be elected, returned, the return approved, and he to be sworn. Although this order may be perhaps the most proper, I would not disturb a corporation on that account. I would say, it was a vexatious complaint. I consider the election, the highest number of legal votes as giving the right to the office to the person elected, and the right to his service to the corporation; and the approbation, by a majority of the nine, as completing formally that right. If the old commissioners alone could approve, I deny their right to set aside the election without proof or against proof. The votes are the substance, the approbation merely a formal part; if it is essential, and to be governed by no rules, the election is idle; it is a mockery.

Cited by Counsel, 5 W. & S. 172; 8 W. & S. 461; 1 Barr, 221; 4 Barr, 97; 7 Barr, 34; 2 J. 363; 7 H. 260; 9 H. 18; 3 C. 452; 4 C. 385; 7 C. 283; 9 C. 497; 11 C. 264; 3 Wright, 77; 3 S. 215; 4 S. 237; 6 S. 469, 470; 7 S. 434; 8 S. 344; 14 S. 341; 25 S. 31; 2 O. 611; 3 O. 537, s. c. 11 W. N. C. 241; 3 W. N. C. 378.

Approved, 9 H. 164.

Cited by the Court, 5 Wh. 560; 1 J. 70; 3 H. 171; 2 S. 478; 20 S. 470.

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*[PHILADELPHIA, JANUARY 30, 1830.]

Bruch, who Survived Ihrie, *against* Lantz, with Notice to Porter and Others, Terre Tenants.

APPEAL.

A sale of real estate by an executor, indirectly to himself, in pursuance of a power in a will, is not a good execution of the power, but the executor takes the estate clothed with the same trusts to which it was subject in his hands previous to the sale; and it matters not whether the executor made advantage by his purchase or not.

Such a sale is not void, but voidable. It may be ratified by those who are entitled to call it in question; but a ratification by the heirs and devisees will not prevent the creditors of the testator from taking the land in execution as his estate.

The act of the 4th of April, 1797, limiting the lien of debts on the real estate of a decedent to seven years, protects such estate only in the hands of a *bona fide* purchaser, and not in the hands of an executor, who has himself become the purchaser.

APPEAL from the Circuit Court of *Northampton* county.

This was a *scire facias* on a judgment confessed by Jacob Lantz to George Ihrie, Esq., and George Bruch, in the Court of Common Pleas of Northampton county, upon the 17th day of August, 1822, for one thousand seven hundred and eleven dollars and ten cents, which had been revived to November Term, 1824, against the defendant, Lantz. The *scire facias* was issued in the same court to August Term, 1827, against the defendant, Jacob Lantz, and terre tenants. The sheriff returned the writ, "made known to Jacob Lantz, the defendant, and to Jacob Raub, Catherine Lantz, and James M. Porter, terre tenants." Pending the *scire facias*, George Ihrie, Esq., one of the plaintiffs, died. The terre tenants removed the cause into this court by *certiorari*, and it was tried at the April Circuit Court, 1829, before Judge ROGERS. The terre tenants, Jacob Raub and Catherine Lantz, put in a disclaimer, as will be seen by the pleadings below, and the cause was tried on the defence made by the terre tenant, Porter. After the evidence was gone through, a verdict was, by consent, entered for the plaintiff, the terre tenant to move for a new trial, and bring the whole case up before the Supreme Court upon the evidence. The defendant pleaded as follows:—

"And the said James M. Porter, by Joel Jones, his attorney, comes and says, that the said plaintiffs ought not to have execution against him of the debt and damages aforesaid, to be levied of the lands and tenements whereof he is returned a tenant, because, he says, that heretofore, to wit: on the 19th day of January, Anno Domini, 1816, one Peter Lantz, now deceased, was

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seised in his demesne as of fee, of and in the lands and tenements aforesaid, and *being so seised, afterwards, to wit: [*393] on the day and year aforesaid, made and published his last will and testament in writing, and therein and thereby made and appointed the aforesaid Jacob Lantz, and one Jacob Unangst, the executors thereof; by which will, the said Peter Lantz did, among other things, order and direct, and empower the said executors to sell for certain uses and purposes, in his said will specified, all his, the said testator's, real estate, of which he should die seised, at public vendue, within one year after the decease of him, the said testator, on the premises; and on the receipt, that is to say, after the receipt of the purchase-money, or security for the same, to execute a good and sufficient deed or deeds, in fee simple, to the purchaser or purchasers thereof, as in and by the said will, more fully and at large appears. And the said James M. Porter further avers, that afterwards, to wit: on the 8th day of June, A. D. 1816, the said executors sold, among other lands, the aforesaid lands and tenements to one Isaac Lantz, as parcel of the estate whereof the said testator died seised, for a large sum, to wit: the sum of ten thousand and ninety-five dollars; and afterwards, to wit: on the 16th day of November, in the year last aforesaid, without having received the said ten thousand and ninety-five dollars, purchase-money aforesaid, or any part thereof, and also without having received any security for the payment of the same, did seal and deliver to him, the said Isaac Lantz, a certain instrument indebted, purporting to be a conveyance of the said lands and tenements from them, the said Jacob Lantz and Jacob Unangst, as executors of the said will of the said Peter Lantz, to him, the said Isaac Lantz, his heirs and assigns, forever. And the said James M. Porter further avers, that afterwards, to wit: on the 2d day of April, A. D. 1822, the said purchase-money, and every part thereof still remaining unpaid by him, the said Isaac Lantz, and not in any wise secured to be paid, or any part thereof, the said Isaac Lantz, by his certain indenture, in due form of law made, bargained, sold, conveyed, and confirmed unto the said Jacob Lantz and his heirs forever, the said lands and tenements, and all the right, estate, and interest, which he, the said Isaac Lantz had, or might have had in or to the same, or any part thereof, by reason of the said instrument indented, first hereinbefore mentioned or otherwise; by means of all which premises, the title or estate, if any, and also the interest which the said Jacob Lantz had at the rendition of the judgment upon which this *seire facias* is founded, or ever after, was, and is an estate and interest in trust, for the uses and purposes of the will aforesaid, and

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not an estate which might or may be charged by reason of the judgment aforesaid against him, the said Jacob Lantz, and this the said James M. Porter is ready to verify—wherefore, he prays judgment if the aforesaid plaintiffs ought to have execution for the debt and damages aforesaid, to be levied of the lands and [*394] tenements *whereof he is returned a tenant, by reason of the judgment aforesaid against the said Jacob Lantz.

“And for a further plea in this behalf, the said James M. Porter, by leave of the court, here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiffs ought not to have execution of the debt, and damages aforesaid, to be levied of the lands and tenements whereof he is returned a tenant; because, he says, that the said Peter Lantz was seised of the lands and tenements aforesaid, and being seised thereof, made and published his last will and testament, and made the said Jacob Lantz and Jacob Unangst, the executors thereof, and did therein and thereby confer certain powers and authorities upon his said executors, in manner, form, and effect, as in the pleading of the said James M. Porter herein before pleaded, is more particularly set forth; and that, theretofore, to wit: on the 25th day of April, A. D. 1814, the said Peter Lantz became, and was indebted to a certain John Lantz, and to a certain John Best, Sen., now deceased, assignee of the said John Lantz, in a large sum, namely, in the sum of six hundred dollars, lawful money of Pennsylvania, and being so indebted, and also seised as aforesaid, of the lands and tenements aforesaid, afterwards, to wit: on the day and year first aforesaid, died, to wit: at Northampton county aforesaid. And the said James M. Porter further avers, that afterwards, to wit: on the 19th day of February, A. D. 1816, the said Jacob Lantz and Jacob Unangst, executors as aforesaid, proved, and took upon themselves the burden of the execution of the said will of the said Peter Lantz, to wit: at Northampton county aforesaid; and the said James M. Porter further avers, that afterwards, to wit: on the 8th day of June, A. D. 1816, the said executors sold the said lands and tenements, among others, as parcel of the estate of the said Peter Lantz, to the said Isaac Lantz; and the said Isaac Lantz purchased the same at the instance and request, and in trust and confidence for the use of the said Jacob Lantz, executor as aforesaid, and not for the use of him, the said Isaac Lantz. And the said James M. Porter further avers, that afterwards, to wit: on the 21st day of January, A. D. 1824, the said debt, which was before that time due by the said Peter Lantz, to the said John Best, Sen., (who, as well as the said Peter Lantz, were then deceased,)

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being still due, and not in any way satisfied or paid, a certain John Best and a certain Jacob Best, as executors of the said John Best, Sen., assignee as aforesaid, went into the Court of Common Pleas of the county of Northampton, and then and there did implead the said Jacob Lantz and Jacob Unangst, executors of the said Peter Lantz, and according to the course of the said court did declare therein against the said Jacob Lantz and Jacob Unangst, upon the said indebtedness of the said Peter Lantz unto the said John *Best, Sen., as aforesaid. Whereupon, such proceedings were had before the said court, that afterwards, to [*395] wit: on the 10th day of September, A. D. 1824, the said John Best and Jacob Best, executors as aforesaid, recovered by the judgment of the said court against the then legal representatives of the said Peter Lantz, the sum of six hundred dollars debt, together with their damages and costs, &c., which said judgment was rendered by the said court, to be levied of the assets of the said Peter Lantz, as by the record of the said judgment remaining in the said court fully appears. And the said James further avers, that afterwards, to wit: at the Term of August, A. D. 1824, of the said court, the said judgment being wholly unsatisfied, and no part of the moneys thereby recovered, paid, the said John Best and Jacob Best prayed, and had of the said court, the award of a certain writ of *feri facias* upon the said judgment, which said writ was directed to the sheriff of the said county, and was made returnable to the Term of November of the said court, in the year last aforesaid. And the said James further avers, that the said John Best and Jacob Best, executors as aforesaid, for want of sufficient personal assets of the said Peter Lantz, whereof the moneys recovered by the said judgment could be made and levied, did then and there direct the said sheriff to levy and execute the said writ upon the said lands and tenements, sold as aforesaid to the said Isaac Lantz, and purchased by the said Isaac, in trust as aforesaid, and in pursuance of the said directions, the said sheriff did, by virtue of the said writ, seize and take into his hands the said lands and tenements, and afterwards, to wit: at the return day of the said writ, made return of the said levy to the court aforesaid, as by the record of the said writ and return remaining in the said court more fully and at large appears. And the said James further avers, that afterwards, to wit: at the said Term of November of the said court, the said John Best and Jacob Best, executors as aforesaid, prayed the said court to award upon the said judgment a certain writ of *renditioni exponas*. Whereupon, such proceedings were had, that afterwards, to wit: in the Term

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of January, A. D. 1825, of the said court, the said court did award the said last mentioned writ, according to the prayer of the said John Best and Jacob Best, executors as aforesaid, which said writ was directed to the sheriff of the county aforesaid, and commanded him to expose the said lands and tenements to sale, and sell the same, and make his return thereof at the next term of the said court, as by the said writ more fully and at large appears; at which last mentioned term of the said court, to wit: on the 30th day of April, in the said term, the said sheriff made return of the said writ, among other things, that he had sold the said lands and tenements to the said James M. Porter, for the sum of two thousand dollars, which said sum, the said sheriff had then and there to satisfy the said judgment of the said John Best and Jacob Best, executors as aforesaid, as by the said writ [*396] he, the said sheriff was commanded, which by the said last mentioned writ and return in the said court remaining, fully appears. And thereupon, the said sheriff did seal and deliver to the said James, his certain deed poll of bargain and sale, conveying the said lands and tenements to him, the said James, and his heirs, forever, in consideration of the said sum of two thousand dollars, and in open court did acknowledge the same to be his deed, which are the same lands and tenements whereof he, the said James, is returned a tenant, and not diverse. By means whereof, the title, interest, and estate, which he, the said Peter Lantz, had in or to the said lands and tenements at the time of his decease, became and were transferred to, and vested in him, the said James, and this he is ready to verify. Wherefore, he prays judgment if the said plaintiffs ought to have execution of the debt and damages aforesaid, to be levied of the lands and tenements whereof he is returned a tenant as aforesaid.

"And for the further plea in this behalf, the said James M. Porter, by leave of the court, here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiffs ought not to have execution of and for the debt and damages aforesaid, to be levied of the lands and tenements whereof he is returned to be a tenant, because, he says, that the said Jacob Lantz, in the said writ of *scire facias* named, or any other person or persons to the use of the said Jacob Lantz, at the time of the rendition of the judgment aforesaid, in the same writ mentioned, or ever after, had nothing in the said lands and tenements, or in any part or parcel thereof in the demesne, reversion or otherwise, which might be charged or bound by reason of the judgment aforesaid, in law or equity, and this he is ready to verify. Wherefore, he prays

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judgment if the said plaintiffs ought to have execution of the debt and damages aforesaid, to be levied of the lands and tenements whereof he is returned tenant as aforesaid.

"And for a further plea, &c., by leave, &c., the said James M. Porter pleads payment, with leave to give the special matters in evidence.

"And the said Catherine Lantz, in her proper person, comes and says, that upon the day of the issuing of the above writ of *scire facias*, viz. : on the 28th day of July, A. D. 1827, she was tenant of the lands and tenements of which she is returned to be tenant, at the will of James M. Porter, Esq., (who also, by the return to the writ aforesaid, is returned to be tenant,) and of her, the said Catherine, and that she hath not, nor doth she claim to have anything in the demesne, or in the reversion of the demesne of the lands and tenements aforesaid, nor had she, nor did she claim to have anything therein on the day of the issuing of the said writ, or ever after, but altogether disavoweth and disclaimeth to have any right, title, estate, claim, or other interest whatsoever of, in, or to the same, save only an estate at will, as aforesaid.

* "And the said Jacob Raub, comes and says, that [*397] he was a tenant of the lands and tenements whereof he is returned a tenant to James M. Porter, Esq., (who also, by the return to the above writ of *scire facias*, is returned to be tenant,) from year to year, namely, from the 1st of April next preceding the issuing of the writ aforesaid, to the 1st day of April next thereafter ensuing, and so on from year to year, at the will of the said James, and of him, the said Jacob; and that he hath not, nor doth he claim to have anything in the demesne, or in the reversion of the demesne of the lands and tenements aforesaid, with the appurtenances, or in any part or parcel thereof, nor had he, nor did he claim to have anything therein, on the day of the issuing of the said writ, or ever after, but altogether disavoweth and disclaimeth to have any right, title, estate, claim, or other interest whatsoever of, in, or to the same, save only an estate from year to year, as aforesaid."

The following notice of special matter was also given:—
"That Peter Lantz died seised of certain lands and tenements in Williams township, among which were the lands in the possession of the persons upon whom the writ has been served as the terre tenants.

"That on the 19th of January, 1816, he made and published his last will and testament, which after his decease, to wit: on the 19th of February, 1816, was duly proved in the register's office in Easton, whereby he appointed Jacob Unangst and his

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son Jacob Lantz, the executors thereof, and among other provisions contained in his will, directed as follows: 'And as to all my real estate, situate in Williams township, aforesaid, or elsewhere, which I may die seised of, I do hereby order and direct, that my said executors herein after named, or the survivor of them, shall sell the same at public vendue within one year after my decease, on the premises, in the whole or in such parts as they shall think most advantageous for my estate, and to such person or persons as may purchase the same, or any part or parts thereof, and on the receipt of the purchase-money, or security for the same to their satisfaction, to execute good and sufficient deed or deeds for the same, or any part or parts thereof, to the purchaser or purchasers, to his or their heirs in fee simple; and the money arising from my personal estate, including money and bonds, &c., together with the money arising from my real estate after the same is sold,' (after deducting certain legacies before mentioned,) 'the balance I give and bequeath in nine equal shares and portions, to wit: to my son Jacob one-ninth;' (and so on to the rest of his children, naming them, but providing as to his son John's share as follows:) 'and the remaining ninth part, I order and direct my executors to put out on good security, and the interest arising therefrom yearly, to pay to my son John only, and to no other person, during his lifetime; and after his decease, the principal to his lawful issue, share and share alike. I do hereby expressly order and direct that one-third of the moneys arising from the [*398] sale of my *personal and real estate, &c., as aforesaid, shall, in addition to what I have already given my said dear wife, be put on interest by my said executors, or the survivor, out of the first moneys they shall receive, for the use of her, and the interest arising therefrom, shall be paid to her, yearly, during her lifetime; which said one-third part shall be deducted equally out of each of my said children's shares, for the purposes aforesaid.' The executors proved the will, and took out letters testamentary thereon.

"That the said executors, on the 8th of June, 1816, put up the real estate to sale, by vendue or outcry, when a tract of two hundred and thirteen acres, an allowance, in which are included the lands in possession of the person returned as terre tenant, was bid in by Isaac Lantz for himself and Jacob Lantz, one of the executors; it being understood by them both, that Jacob Lantz, one of the executors, was to be partner in the purchase: That a deed was made to the said Isaac Lantz, on the 16th of December, 1816, but the purchase-money was not paid, nor was security taken for the payment thereof.

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"That on the 17th of March, 1817, Isaac Lantz conveyed a moiety, or half part of the said land to the said Jacob Lantz.

"That the said Jacob Lantz and Isaac Lantz, by deed, dated the 18th of March, 1817, conveyed twenty-four acres and seventy perches, part of the said tract of two hundred and thirteen acres and allowance, to George Lantz.

"That on the 2d of April, 1822, the said Isaac Lantz conveyed to the said Jacob Lantz, the residue of the said tract of two hundred and thirteen acres, by deed, purporting to convey the whole of that residue.

"That Jacob Lantz and Jacob Unangst, the executors having failed to pay a debt due by their testator to John Best and Jacob Best, executors, &c., of John Best, Sen., deceased, who was assignee of John Lantz, on a bond, dated the 25th of April, 1814, for the payment of three hundred dollars on the 27th of May, 1817, a suit was brought in the Court of Common Pleas of Northampton county to April Term, 1824, against the said executors, to recover the amount.

"That pending the said suit, to wit: on the 24th of February, 1824, the said Jacob Lantz and Jacob Unangst were removed from their executorship by the Orphans' Court of Northampton county, and letters of administration, with the will annexed, were granted to Jacob G. Raub and George Raub.

"That on the 10th of September, 1824, judgment was obtained in the said suit against the administrators *de bonis non*, who had been substituted as defendants.

"That a *fieri facias* issued upon the said judgment under which the said premises of which the said James M. Porter, Jacob *Raub, and Catherine Lantz, are returned terre tenants, [*399] were levied, and under a *venditioni exponas*, issued to April Term, 1825, sold by the sheriff to James M. Porter, to whom a deed was made, and acknowledged on the 30th of April, 1825.

"That at the term to which the said *venditioni exponas* was returnable, the said Jacob Lantz, by his counsel, moved to set aside the sale: That the plaintiffs in this suit were privy to his conduct therein: That the purchaser then offered to the creditors, that if they would pay off the debt due to Best's estate, secure what the widow ought in justice to be entitled to out of the premises, and make some provision for John Lantz, the creditors of Jacob Lantz should have the property: That they considered on the proposition for five days, and finally, said they would not assent to it, and agreed that the sale should be confirmed.

"That the plaintiffs, when the premises were up for sale at

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one time, procured Frederick Willhelm to bid on the property, to whom it was struck off, but who never paid any money, and on the last sale, they employed one Peter Dennis to bid on the same, and the premises were struck off to him; but he not paying the money, the premises were returned, sold to James M. Porter, the next highest bidder: That the said Frederick Willhelm and Peter Dennis, were both notoriously insolvent and had been employed to bid, in order to delay and defeat the plaintiffs in the execution under which the premises were up for sale."

To the defendant's plea the plaintiff replied as follows:—
 "And the said George Bruch, who survived the said George Ihrie, Esq., as to the said plea of the said James M. Porter, by him first above pleaded, says, that he, the said George, by reason of anything by the said James in that plea alleged, ought not to be barred from having execution against him of the debt and damages aforesaid, to be levied of the lands and tenements, whereof he, the said James is returned tenant; because, he says, that the title or estate, and also the interest which the said Jacob Lantz had in the said lands and tenements at the rendition of the judgment upon which the said writ of *scire facias* is founded, and ever after, was and is an estate in fee simple in him, the said Jacob Lantz, and for the use of him, the said Jacob, which might and may be charged by reason of the judgment aforesaid, against the said Jacob Lantz, and not an estate and interest in trust, for the uses and purposes of the will of the said Peter Lantz, deceased, in manner and form as the said James has in the said plea, by him first above pleaded alleged, and this he, the said George, prays may be inquired of by the country, &c.

"And the said George Bruch, who survived the said George Ihrie, Esq., as to the said plea of him, the said James M. Porter, by him secondly above pleaded, says, that he, the said George, by reason of anything by the said James in that plea alleged, ought not to be barred from having execution against him of the [400] debt and damages *aforesaid, to be levied of the lands and tenements whereof he, the said James, is returned a tenant; because, he says, that the said Jacob Lantz and Jacob Unangst, executors of the last will and testament of the said Peter Lantz, deceased, at the day and time in the plea of the said James, by him secondly above pleaded, mentioned, by virtue of the power and authority given to them by the will aforesaid, sold the said lands and tenements among others, as parcel of the estate of the said Peter Lantz, deceased, to Isaac Lantz, and the said Isaac Lantz purchased the same to be held by him,

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the said Isaac, in fee simple, and for the use of him, the said Isaac, and not in trust and confidence for the use of the said Jacob Lantz, executor as aforesaid, as by the plea aforesaid, of the said James, by him secondly above pleaded is alleged; and the said George Bruch, in fact, says, that the said Isaac Lantz being so seised of the lands and tenements as aforesaid, he, the said Isaac, and Elizabeth, his wife, afterwards, and before the rendition of the judgment aforesaid, to wit: on the 2d day of April, in the year of our Lord, one thousand eight hundred and twenty-two, at the county aforesaid, by their certain indenture, under their hands and seals, duly executed for the consideration therein mentioned, did grant and convey the same to the said Jacob Lantz, his heirs and assigns, to his and their only proper use, benefit, and behoof, forever, as by reference to the said indenture, will more fully and at large appear. And the said George Bruch, in fact, further says, that the lands and tenements conveyed by the said Isaac Lantz, and Elizabeth, his wife, as aforesaid, to the said Jacob Lantz, are the same lands and tenements of which the said James M. Porter is returned a tenant, and not diverse. And the same George Bruch, in fact, further says, that by means of the said last-mentioned indenture, by which the lands and tenements aforesaid were granted and conveyed to the said Jacob Lantz, as aforesaid, all the title, interest and estate, which he, the said Peter Lantz had in or to the said lands and tenements at the time of his decease, became, and were transferred to, and vested in the said Jacob Lantz, in fee simple, and for the use of him, the said Jacob, and continued to be so vested in the said Jacob Lantz at the time of the rendition of the judgment aforesaid, and from thence hitherto still continue to be so vested in the said Jacob, and not in the said James M. Porter, and this the said George prays may be inquired of by the country, &c.

“And the said George Bruch, who survived the said George Ihrie, Esq., as to the said plea of him, the said James M. Porter, by him thirdly above pleaded, says, that he the said George, by reason of anything by the said James, in that plea alleged, ought not to be bound from having execution against him of the debt and damages aforesaid, to be levied of the lands and tenements whereof the said James is returned a tenant; because, he says, that he, the *said Jacob Lantz, at the time of the rendition of the judgment in the writ of *scire facias* above [*401] mentioned, and long after, was, and yet is seised of the said lands and tenements whereof the said James is returned a tenant as aforesaid, and every part and parcel thereof in his demesne as of fee, as by the return of the writ aforesaid is

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above supposed, and this he prays may be inquired of by the country.

"And the said George Bruch, who survived the said George Ihrie, Esq., as to the said plea of the said James, by him fourthly above pleaded, replies, '*non solvit*,' and this he prays may be inquired of by the country.

"And because the said Catherine Lantz disavoweth and disclaimeth to have any right, title, estate, claim, or other interest whatsoever of, in, or to the said lands and tenements, save only an estate at will, as in her disclaimer is above mentioned, therefore, upon the prayer of the said George Bruch, it is considered, that the said George have execution against her, the said Catherine, for the debt and damages aforesaid, to be levied of the lands and tenements whereof the said Catherine is, as aforesaid, returned tenant, but let the execution of the said judgment stay until the pleas aforesaid, between the said James M. Porter and the said George Bruch be determined, &c.

"And because the said Jacob Raub disavoweth and disclaimeth to have any right, title, estate, claim, or other interest whatsoever of, in, or to the said lands and tenements, save only an estate at will, as in his disclaimer is above mentioned, therefore, upon the prayer of the said George Bruch, it is considered, that the said George have execution against him, the said Jacob Raub, for the debt and damages aforesaid, to be levied of the lands and tenements whereof the said Jacob is, as aforesaid, returned tenant, but let the execution of the said judgment stay, in the meantime, until the pleas aforesaid between the said James M. Porter, and the said George Bruch, who survived the said George Ihrie, Esq., be determined, &c."

On the trial, the plaintiff gave in evidence, the record of a judgment, No. 124, August Term, 1822, George Ihrie, Esq., and George Bruch v. Jacob Lantz, D. S. B., one thousand seven hundred and eleven dollars and ten cents; judgment confessed the 17th of August, 1822, by Peter Ihrie, Jr., Esq., attorney of the defendant by warrant constituted:

Also a revival of this judgment by amicable *scire facias* No. 11, November Term, 1824—20th September, 1824, judgment revived by agreement:

Also a *fiery facias* to November Term, 1824, No. 69, issued the 20th September, 1824. Real debt nine hundred and sixty-three dollars and sixty-two cents; interest from the 20th of September, 1824. Returned by the sheriff, "levied as per inventory." This *inventory was "all the right, claim, [*402] and interest of the defendant in, and to the grain in the ground," &c.

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The plaintiff then gave in evidence the last will and testament of Peter Lantz, deceased, dated January 19th, 1816, and proved before the register, &c., of Northampton county, on the 19th day of February, 1816. The material parts of the will are as stated in the notice of special matter.

The plaintiff then called Bernard Unangst as a witness, who, being sworn, testified, "that he was the clerk at the vendue of the real estate of Peter Lantz, deceased: That the paper shown to him was the conditions of that sale: "That the conditions were read by him: That the sale was held on the premises, and that Isaac Lantz became the purchaser."

The plaintiff then gave in evidence the conditions of the sale, held on the 8th day of June, 1816, and an acknowledgment subjoined thereto, dated the same day, signed by Isaac Lantz, stating, that he had purchased the property for ten thousand and ninety-five dollars. The conditions and acknowledgment were as follows:—

"PUBLIC VENDUE,

"Of a certain messuage, tenement, and plantation, situate in Williams township, in the county of Northampton, and state of Pennsylvania, and adjoining lands of John Bloom, Peter Sailer, John Sellers and others, and containing two hundred and thirteen acres and allowance, agreeably to the courses and distances of a certain patent from the commonwealth of Pennsylvania, dated the 26th of September, A. D. 1788, granted to Nicholas Lantz, the father of the said Peter Lantz, deceased.

"The conditions of sale are as follows, to wit:—

"The highest bidder to be the purchaser. One-third of the purchase-money to be paid on the 1st day of April next. The residue to be paid in three equal yearly payments, without interest—the first of said yearly instalments to be made on the 1st of April, 1818, 1819, 1820. To be secured by bonds and mortgage, or such other security as shall be demanded by the executors. A free deed is to be executed for the premises on the payment of the first payment, to wit: on the 1st day of April next, and possession of the premises on the said day, or on any other day prior to the same, if the said executors shall think it proper.

"JACOB UNANGST, }
"JACOB LANTZ, } Executors.

"*Williams Township, June 8th, 1816.*"

"I do hereby acknowledge that I have purchased the above-described premises at the sum of ten thousand and ninety-five

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[*403] dollars, *on the conditions above written. Witness my hand, June 8th, 1816.

“ISAAC LANTZ.

“Witness, { BERNARD UNANGST, JR.
JACOB DEEMER.”

The plaintiff then offered in evidence, a deed, dated November 16th, 1816, from Jacob Unangst and Jacob Lantz, executors, &c., of Peter Lantz, deceased, to Isaac Lantz, conveying the premises in question as two hundred and twelve acres and one hundred and sixty perches, for the consideration of ten thousand and ninety-five dollars; to the admission of which in evidence, the terre tenant objected, on the ground that the plaintiff must first show the due execution of the power to sell given to the executors of Peter Lantz, deceased, by proving that the purchaser, Isaac Lantz, either paid the purchase-money, or gave security for the same, previous to the execution of the deed. But his honour being of opinion, that the acknowledgment of the executors in the deed, of the paying and securing of the purchase-money, was *prima facie* evidence of that fact, so as to admit the deed in evidence, permitted it to be read.

The deed was acknowledged on the 16th of December, 1816, before George Ihrie, Esq., but not recorded.

The plaintiff then gave in evidence a deed, dated the 2d of April, 1822, from Isaac Lantz and his wife, to Jacob Lantz, conveying the tract in dispute as two hundred and ten acres and eighty perches, for the consideration of three thousand five hundred dollars, acknowledged the same day before George Ihrie, Esq., and recorded on the 30th of October, 1822.

The plaintiff then gave in evidence a deed from Isaac Lantz to Jacob Lantz, dated the 19th of March, 1817, conveying the moiety of the tract for the consideration of five thousand and forty-seven dollars, acknowledged the same day before George Ihrie, Esq. On this deed no receipt was indorsed, nor was it recorded.

The plaintiff next offered a receipt, purporting to be signed by Catherine Lantz, dated September 18th, 1816, to Jacob Lantz and Jacob Unangst, executors of Peter Lantz, deceased, for one hundred dollars, bequeathed to her by the will. This was objected to by the terre tenant, on the ground, that receipts for moneys paid to a third person are not evidence, but the persons themselves should be produced. The objection was, however, overruled, and the receipt read.

The plaintiffs then called Philip B. Unangst as a witness, who being sworn, proved his signature to four receipts, and further

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said, "I did not receive the money mentioned in these receipts, but it answered the same purpose. I bought a lot of John Bloom, and he lent the money to Isaac and Jacob Lantz. I did not get any money except for the first receipt, and that was out of the personal *property, and is dated May 30th, 1817. [*404] The other three were paid on the land."

The three receipts were then read, and were as follows :—

"31st of March, 1818.—Philip B. Unangst to Jacob Lantz, for two hundred and forty-four dollars and fifty-nine cents. 1st of April, 1819.—Same to same, two hundred and forty-four dollars and fifty-nine cents. 1st of April, 1820.—Same to same, two hundred and sixty-five dollars and eighty-six cents."

On being cross-examined, the witness said, "I have not received any security for that part of my share in my father-in-law's estate, falling due after the death of the old woman."

On his re-examination, he added, "I have the full amount of the share to which I am entitled at this time."

The plaintiff then called Christopher Heller, who proved his signature to three receipts, and testified, "I have received all the money. I have received no security for what falls due on the land on the death of the old woman. I never asked for any."

The receipts were then read as follows :—

"30th of April, 1818.—Receipt, Christopher Heller to Jacob Lantz, two hundred and forty-four dollars and fifty-nine cents. 3d of May, 1819.—Same to same, two hundred and forty-four dollars and fifty-nine cents. 27th of May, 1820.—Same to same, two hundred and fifty-six dollars and sixty-eight and a half cents."

The witness then stated, "I have received all that is coming to me at this time out of my father-in-law's estate."

The plaintiff then called George Lantz, who proved his signature to three receipts, which were given in evidence as follows :—

"1st of April, 1818.—George Lantz to Jacob Lantz, two hundred and forty-four dollars and fifty-nine cents. 1st of April, 1819.—Same to same, two hundred and forty-four dollars and fifty-nine cents. 26th of February, 1821.—Same to same, two hundred and fifty-six dollars and sixty-eight and a half cents."

Being cross-examined, the witness stated, "I got this money. I got a piece of the land. The land was included in the receipts. I paid for the land by giving the receipts. I purchased of Jacob and Isaac Lantz. I am satisfied for my share to this day. They gave me no security for what comes due after the death of my mother, nor did I ask for any. I am the same George Lantz

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who took the benefit of the insolvent laws. The land I got was part of my father's land."

The plaintiff then called Nathaniel Michler, Esq., who testified, "that he signed three receipts, (shown to him,) as a witness, and saw Catherine Lantz sign them: That he did not recollect seeing any money paid."

[*405] *The receipts were then read, as follows:—

16th of April, 1819.—Catherine Lantz to Jacob Lantz and Isaac Lantz, for two years' interest, due the 16th of April, 1818, and 16th of April, 1819, five hundred and seven dollars and twenty-two cents. 16th of April, 1820.—Same to same for one year's interest due that day, two hundred and fifty-three dollars and sixty-one cents."

The plaintiff then called Peter Lantz, who proved his signature to a receipt, which was read as follows:—

"14th of April, 1818.—Peter Lantz to Jacob Lantz, for two hundred and forty-four dollars and fifty-nine cents."

In relation to this receipt, the witness stated, "I got a part of this in money and a part in land. Jacob and I purchased a piece of land together of George Ihrie, Esq. I afterwards bought Jacob out, and the money went on this."

An acknowledgment, dated the 21st of January, 1825, by Peter Lantz, that on or about the 1st of April, 1819, he received of Jacob Lantz, two hundred and forty-four dollars and fifty-nine cents; and on or about the 1st of April, 1820, he received two hundred and fifty-six dollars and forty-eight and a half cents, was also given in evidence.

The witness then proceeded, "I am satisfied for my share of my father's estate due at this time."

On being cross-examined, he said, "I have received no security for my part which falls due on my mother's death. I never asked for any."

Jacob G. Raub being called by the plaintiff, testified to three receipts, which were given in evidence as follows:—

"31st of March, 1818.—Jacob G. Raub to Jacob Lantz, two hundred and forty-four dollars and fifty-nine cents. 1st of April, 1819.—Same to same, two hundred and forty-four dollars and fifty-nine cents. 2d of April, 1823.—Same to same, two hundred and twenty-five dollars."

The witness further stated, "I got the money stated in these receipts. I got no security for what has yet to become due on the old woman's death. I am not altogether paid—there are about sixty or seventy dollars coming to me yet. I spoke to Jacob Lantz, several times for security for my share coming due

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after the old woman's death. He said it was secured on the land—that the whole was secured, interest and all."

The plaintiff then offered in evidence the account of Jacob Lantz and Jacob Unangst, executors of Peter Lantz, deceased, exhibited the 16th of April, 1817, to which the terre tenant objected; but it being stated, that it was offered merely "for the purpose of showing, *that the executors had settled [*406] the estate as they ought to have done," it was admitted by the court, and read to the jury.

By this account, it appeared that the balance then due and for distribution, amounted to	\$5626 44½
Due on the 1st of April, 1818,	2243 33½
Due on the 1st of April, 1819,	2243 33½
Due on the 1st of April, 1820,	2243 33½

Isaac Lantz being called by the plaintiff, testified, "My part remained in the land; I had purchased the land."

Being cross-examined, he said, "I purchased it alone. It was understood, that when I purchased the land, Jacob was to have the half. I gave a bond for the whole, and gave George Bruch and George Lerch as securities; and when I gave up the land to Jacob Lantz, I told him I must have my bond. We came to Esquire Ihrie's. I said I would have my name out, and either Esquire Ihrie or I took my name out—I tore it out. George Bruch, the plaintiff, was one of the sureties. This was not when the first deed was made. I do not know when it was. I did not receive any money. I lost my whole portion in it. I did not pay any money out. George Ihrie was present when the bond was destroyed. Jacob Lantz was present. I do not know whether I told George Bruch or not. I saw that bond last at Esquire Ihrie's. I have it not. I tore my name out of the bond; it was torn out, but whether Esquire Ihrie did it or I did, I cannot say. There was no other security given."

The plaintiff then produced and gave in evidence, a release, dated the 25th of November, 1822, given by Isaac Lantz to Jacob Lantz and Jacob Unangst, of all interest in the estate of Peter Lantz, deceased. And thereupon the plaintiff closed for the present.

The terre tenant then gave in evidence, the record of a suit in the Court of Common Pleas of Northampton county, of April Term, 1824, No. 4—the docket entries of which were as follows:—

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<p>“Porter, {</p> <p>“Ihrie, {</p> <p>“<i>Fi. fa.</i> To Novem- ber, 1824. 78. {</p>	<p>John Best and Jacob Best, Executors of John Best, Sen., deceased, who was assignee of John Lantz,</p> <p style="text-align: center;">v.</p> <p>Jacob Lantz and Jacob Unangst, Executors, &c., of Peter Lantz, deceased.</p> <p>“And now, September 10th, 1824, by agree- ment filed, Jacob G. Raub and George Raub, adm'ors <i>de bonis non</i>, with the will annexed of Peter Lantz, deceased, are substituted as defend- ants in the room and stead of Jacob Lantz and Jacob Unangst, the executors of the last will and</p>	<p><i>Summons,</i></p> <p>Debt \$600, issued Janu- ary 24, 1824.</p> <p><i>Summoned.”</i></p>
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[*407] testament of the deceased, who have *been dismissed from their executorship, and that judgment be entered for the plaintiff in the above action. The said judgment not to be considered as charging the said administrators with assets. This agreement was witnessed by George Wolf, Esq.”

The *feri facias* to November Term, 1824, No. 78, was directed “to be levied of the goods and chattels, lands and tenements, which were of Peter Lantz, late, &c., deceased, in the hands of Jacob G. Raub and George Raub, adm'ors *de bonis non*, with the will annexed of said Peter Lantz, deceased.” It issued for a debt of six hundred dollars, and damages, (or costs,) six dollars and sixty-one cents. It was indorsed “Real debt three hundred and thirty-two dollars and twenty-five cents. Interest from the 10th of September, 1824.”

Upon the terre tenant's counsel being about to read to the jury the levy and return of the sheriff to the before-mentioned *feri facias*, the counsel for the plaintiff objected, on the ground, that the property was no longer the estate of Peter Lantz, deceased, but had already been sold to pay debts and legacies; but the court, after argument, admitted them in evidence, reserving the point, and the levy and return were read as follows:—

“By virtue of the writ I have seized and taken in execution a certain tract of land, situated in Williams township, Northampton county, adjoining lands of Peter Lantz, Henry Krutz, Peter Sailor, Peter Zeller and others, containing two hundred and ten acres, be the same more or less, on which is erected a dwelling house, part stone and part frame, a stone smoke house, a log barn, a frame barn, a log stable, wagon house, cider press, and other the appurtenances, which remains in my hands unsold for want of buyers.” So answers John Carey, Jr., sheriff.

The terre tenant then gave in evidence an agreement, attached to the *feri facias*, and return as follows:—

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“John Best and Jacob Best, Executors, &c., of John Best, deceased. v. Jacob G. Raub and George Raub, adm’ors <i>de bonis non</i> , with the will annexed of Peter Lantz, deceased.	}	“ <i>Fi. fa.</i> To November Term, 1824.
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“To JOHN CAREY, Jr., Esq., Sheriff.

“We hereby consent to a condemnation of the premises, levied on in this case.

“JACOB G. RAUB,
“GEORGE RAUB.”

A *venditioni exponas* issued to January Term, 1825, No. 46, upon which the sheriff returned, “Advertised—up for sale, and *struck off to Peter Dennis, for two thousand five hundred and thirty dollars; the money not paid. Unsold [*408] for want of buyers.”

An *alias venditioni exponas* issued to April Term, 1825, No. 37.

April 26th, 1825. On motion of Mr. Wolf, rule to show cause why the sale shall not be set aside.

The following were the exceptions to the sale:—

“1. That the premises were sold under a judgment of three hundred and thirty-two dollars and twenty-five cents, with interest from the 10th of September, 1824, at the suit above-mentioned, the amount of which judgment, Peter Shively, one of the creditors of Jacob Lantz, in whom the title to the premises sold under the above writ is vested, offered to pay to the plaintiffs, before the sale of the property, provided they would transfer to him their judgment, which they refused to do.

“2. That the creditors of Jacob Lantz, by obtaining the above judgment, would have it in their power to sell the property, in such a manner as to enable them to secure their respective claims against the said Jacob Lantz, in as much as they would have it in their power to sell the property on credit, and by that means cause it to produce a much larger price than that at which it has been sold by the sheriff.

“3. That the creditors of Jacob Lantz are willing at this time to discharge the debt, interest, and costs, due to the plaintiffs above named, provided they will transfer their judgment.

“4. That the property has been sold at a great sacrifice, it consisting of two hundred and ten acres of valuable land, with valuable improvements, and having been sold for two thousand and ten dollars, which is not more than half its value, the said property having been sold to Jacob Lantz, some years since, for ten thousand and ninety-five dollars.

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"5. That Frederick Willhelm, the purchaser at sheriff's sale, is unable to comply with the terms of the sale, and the sheriff is about to return the property as sold to the next bidder, James M. Porter, Esq., at the sum of two thousand dollars, which is altogether an inadequate price.

"JACOB LANTZ.

"Sworn and subscribed April 26, 1825, before

"GEORGE IHRLE, J. P."

April 30th, 1825, the rule was discharged; and on motion of Mr. Porter, the court appointed Philip H. Mattes, Esq., commissioner, to report the facts in the case, together with the nature and amount of the liens, &c.

The terre tenant then offered to give in evidence the report [*409] made by *Mr. Mattes, in pursuance of his appointment, which was objected to, and rejected by the court.

The terre tenant then gave in evidence a deed from John Carey, Jr., sheriff of Northampton county, to James M. Porter, for the premises in question, sold under the *alias venditioni exponas* above mentioned. The deed was dated the 30th of April, 1825, was acknowledged in open court, and recorded the same day.

The terre tenant then gave in evidence the record of the proceedings of two justices and a jury, under the act of assembly to enable purchasers at sheriff's sale to obtain possession, by which Jacob Lentz was evicted from the premises, and possession of them delivered to James M. Porter, on the 9th day of August, 1825.

The defendant thereupon called Jacob G. Raub as a witness on his behalf, who testified: "I was present in the court house when this property was up for sale. Mr. Porter got up after the conditions of sale were read, and said, the sale was a fair one, and the title would be a good one, and that he would give two thousand dollars for it. The sheriff took his bid—a bid was made above him of five or ten dollars. Frederick Willhelm, I think, came forward and signed the conditions. I know Frederick Willhelm; he was worth nothing then, and is worth nothing now. Peter Dennis bid it off once—he is worth nothing, and was worth nothing then. There was no other bidders. Dennis was the highest bidder."

On his cross-examination, he said, "I believe Frederick Willhelm signed the conditions. I saw him come forward, and I believe he did sign them. Mr. Porter was next to the highest bidder both times. Mr. Porter said, the sheriff should not delay the property on account of such a purchaser, who was not

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able to comply with the conditions : That if he did not comply, he was ready to take it at his bid. I live on the property as tenant under Mr. Porter. There is no written lease between Mr. Porter and myself."

It was admitted by the counsel for the plaintiff, that when the motion to set aside the sale was made, Mr. Porter offered in open court, that if the creditors of Jacob Lantz would secure to the widow whatever was the value of one-third of the land, to be enjoyed during her life, and pay off the debt of Best, the sale might be set aside or returned to any one else.

The defendant then called Philip H. Mattes as a witness, who being sworn, testified : "I was appointed auditor under the suit of Best's executors against Lantz, on the 30th of April, 1825. It was stated by some of the creditors, that when the property was sold to Isaac Lantz, the executors had taken a bond, with George Bruch and George Lerch, sureties, for the payment of the widow's interest : That this bond was given up when Jacob Lantz purchased of Isaac Lantz. After I had drawn up my report, I saw Mr. Jacob Lantz, and he stated explicitly, that no bond, nor any security whatever, had been taken for any part of the purchase-money. Previous to this, I have been [*410] one of the auditors to settle the administration account. These receipts were produced charged against the widow. The widow stated she had never received the full amount of her interest—and this was admitted. She had lived in the family and had agreed to give a receipt in full : That though the receipt on its face was for a sum of money, yet that was not the actual fact : That she had given these receipts to aid her sons. This Jacob Lantz admitted. Another settlement was made on the 21st of September, 1823, and Jacob Lantz gave his note for ninety-six dollars and thirty-one cents, due her in 1822—the year 1823, was not taken into consideration."

The defendant next called Jacob Raub as a witness, who testified :—"Mrs. Lantz has lived on the property since Mr. Porter got it. She has paid no rent. Mr. Porter has furnished her money, grain and fire wood. She occupies the stone part of the house—the best part of it."

Being cross-examined, he stated : "She has lived there ever since her husband's death. Towards the last she complained very much, and I helped her along. Near about the time of the sale, she was very scantily kept. She had no shoes and no money. Shortly after Mr. Porter purchased, he bought a pair of shoes, and sent them to her. Since the sale she has lived comfortably."

The defendant thereupon called George Raub as a witness,

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who being sworn, testified :—"My wife is one of the heirs of Peter Lantz, deceased. She has had some of her share, but not much, very little. She received some before I was married. When I got a bond, there was rising eight hundred dollars due. I got a bond from Jacob Lantz, George Bruch, and George Ihrie, Esq. I have never received any money on this bond. Payment has been refused on that bond. I put it in the hands of counsel for collection. The bond was for the money now due—it does not include that coming due after the widow's death. There is no security for that."

On being cross-examined, the witness added :—"I consider myself perfectly safe with the sureties. The reason they refused to pay was, that the land was taken away from Jacob. This is the bond :

"16th of August, 1822.—Bond, Jacob Lantz, George Bruch, and George Ihrie, to George Raub ; penalty one thousand seven hundred and eleven dollars and ten cents, conditioned to pay eight hundred and fifty-five dollars and fifty-five cents, with interest."

The defendant thereupon called Jacob Unangst as a witness, who being sworn, testified :—"When the property was sold to Isaac Lantz, there was no money paid, nor security given immediately. The will said, we might sell it in whole or in piece. We sold altogether. It was not understood, that my son-in-law should have a piece of it. I know nothing of any bargain between Jacob and Isaac. I never received any money from the land. I know [*411] *of no security given, to secure the interest of the widow and John Lantz. I own no property at this time. Jacob Lantz owns nothing as I know. We live close together."

On his cross-examination, he testified, "I live near the old place not half a mile. As much as I know, she had nothing to complain of while Jacob Lantz lived there. She had everything enough. At first I was frequently there, but latterly I was sick. Jacob did everything. There was no security given when Isaac first purchased. I do not know of any bond being given. I had none. I had nothing in my hands. Jacob had all. Esquire Ihrie did all the writing for us. Isaac gave a bond. I think he gave it to us. No other person joined in the bond. I can't recollect that he gave any security. The people thought the land was high, and so did I."

The plaintiff then, as repelling testimony, called Jacob Best as a witness, who, being sworn, testified : "Jacob Lantz called on me, and asked whether my father was willing to take a bond from his own hand for the half, and sue Peter Sailor for the half. My father was living, and Sailor had been sold out by the

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sheriff. I told him there was nothing to be had from Sailor, and if we sued, we had to sue both. They paid on the interest till about two years before we sued. We did not receive any interest after my father's death. Just before the sale, Peter Shively came and asked if I would sell the bond to him or not. I told him we had employed Mr. Porter, and I must ask him. Mr. Porter said I should not sell it: that they wanted to injure the widow. Shively said he would pay it almost any time, if I would let him have the bond. I cannot remember that the sheriff took an assignment of the bond. Peter Shively was able to pay."

When cross-examined, he said, "Shively did not produce any money. Shively wanted me to assign the bond—he would buy it and pay the money for it. Peter Dennis is good for nothing—he has taken the act a couple of times. Mr. Porter said that by getting such poor bidders, they would prevent a sale if they could. Mr. Porter said that if I assigned the bond, it would turn the old lady out of house and home, and that I should not assign the bond. I afterwards saw Shively, and told him that Mr. Porter said I should not do it. Shively did not give any reason for wanting the bond—he said he wanted to buy it."

The plaintiff then exhibited a list of judgments against Jacob Lantz, showing them to amount to two thousand four hundred and six dollars and seventeen cents.

The plaintiff then called Abraham Sigman, who, being sworn, testified: "I was in the court house when the property was bid off by Willhelm. George Ihrie, Esq., was in when the property was put up for sale."

The court charged the jury, that under this evidence the plaintiff was entitled to recover.

*The following were the reasons assigned for a new [*412] trial:—

"1. That the court erred in admitting in evidence the deed dated the 16th of November, 1816, from Jacob Lantz and Jacob Unangst, executors, &c., of Peter Lantz, deceased, to Isaac Lantz, and the deeds from Isaac Lantz to Jacob Lantz.

"2. The court erred in admitting in evidence, 1. The receipt of Catherine Lantz. 2. The receipts of Philip B. Unangst. 3. The receipts of Christopher Heller. 4. The receipts of George Lantz. 5. The receipts of Peter Lantz. 6. The receipts of Jacob Raub. 7. The release of Isaac Lantz, and all the evidence tending to show payments by Jacob or Isaac Lantz to the legatees.

"3. That the court erred in charging the jury, that Jacob Lantz had an interest in the land on which the plaintiff's judg-

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ment was a lien at the time of the rendition of the original judgment in this cause; and that under the evidence, the plaintiff was entitled to recover.

“4. That the court should have charged the jury, that under the evidence in the cause, on the conveyance of the lands by Isaac Lantz to Jacob Lantz, Jacob Lantz took the same only upon the trusts, and for the purposes specified in the will of the testator, Peter Lantz.

“5. That the court should have charged the jury, that under the sheriff's sale, James M. Porter, the terre tenant, acquired all the estate of Peter Lantz, the testator, in the premises, and was, therefore, entitled to a verdict in his favour.”

Tilghman and *J. Sergeant*, for the appellant.—Jacob Lantz had no title to the lands attempted to be affected by the judgment against him. His execution of the power in the will of Peter Lantz, under which his pretended title is derived, is totally defective, and vested no interest in him. Powers must be strictly pursued in their execution, particularly where the sale is for the payment of legacies. The want of signing, sealing, attestation, enrolling the prescribed number of witnesses, where these things are required by the instrument creating the power, will avoid the execution of it. *Willes*, 109; 2 *Preston Abs. of Titles*, 249, 262, 267, 273, 279. Here the power was to sell in a mode indicated by the testator, for cash or security. Isaac, the brother of Jacob, nominally, became the purchaser, for the benefit of Jacob, the executor and trustee. No money was paid; no mortgage or security of any kind given; and, consequently, all that was pretended to have been done in execution of the power was void. The sale was not only in contradiction to the directions of the will, but of the conditions of sale of the executors themselves, according to which, one-third of the purchase-money was to be paid on the 1st of April following, and the residue in three equal annual payments, secured by bond and [*413] mortgage, *or such other security as the executors might demand. It is true, to a certain extent, that the character of the security was left to the discretion of the executors, but they exercised no discretion, took no security; and security of some kind was indispensable to a valid execution of the power. The bond taken was cancelled, without any equivalent, which was inequitable and fraudulent.

A still greater objection to the sale exists. The executor purchased under cover, for his own benefit; and, therefore, cannot hold the property, for equity never permits a trustee to become a purchaser of the trust estate, without the consent of

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the *cestui que trust*. It is the contrariety of interest between the buyer and seller which produces a fair price, which cannot be attained when the same person is both buyer and seller. Such a deed as that under which Jacob Lantz purchased, like a voluntary deed, is good against the parties to it, but void against everybody else. There is no case to show, that a trustee may purchase from himself, even if he does not make advantage by the purchase. The receipts given in evidence, were for payments subsequent to the sale under which the plaintiff claims, and with which the defendant had no concern. They did not amount to a ratification of the execution of the power, for a man can ratify only for himself, and not for others. The effect of treating them as a ratification, will be to prejudice creditors by a family arrangement, which can never be permitted. The defendant certainly never ratified the sale, and the act of no one else could bind him: That he did so actually, is not pretended, and there is nothing to show, that he did so constructively. Even if the original sale had been to Isaac for his own benefit, yet when Jacob afterwards purchased of him, he took the estate subject to all the trusts which attached to it in the hands of the executors, as if there had been no sale. *Boon v. Smith*, 1 Vern. 60, 61; 2 Preston Abs. 231; 2 Madd. Ch. 127; 2 Eq. Ca. Ab. 384.

It is not necessary to inquire whether the will gave a power to sell for payment of debts. If it did not, the land remains charged, for a sale under a power to pay legacies, does not put the estate beyond the reach of creditors. *Hannum v. Spear*, 2 Dall. 291; s. c. 1 Yeates, 553. This is emphatically the case, where the purchaser is the executor, who has paid nothing. He holds it subject both to debts and legacies. This he did before the sale, and he cannot, by making a sale to himself, alter his situation. He remains a trustee just as if there had been no sale. His title is under the will, not under the sale; for there was no sale which the law will recognize.

Such a case as this is not affected by the act of limitations of the 4th of April, 1797. It is not necessary to contend, that the debts of Peter Lantz remained a lien on his estate. Lands may be sold though there be no lien. If it be said, there is a judgment against the heir, and the plaintiff is a creditor, and not a purchaser, the answer *is, the defendant is also a cred- [*414] itor. Their equities are, therefore, equal, and the defendant has the priority; because, his debt attached upon the land first, as the estate of the testator immediately on his death.

Binney, for the appellee.—Has the creditor of the testator

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lost his lien upon the land? On the 19th of February, 1816, the will of Peter Lantz, which contained a power to sell, was proved. On the 8th of June, 1816, a sale was made by the executors to Isaac Lantz, and on the 16th of November, 1816, a deed for the premises was executed by the executors to the purchaser. The security may, at first, have rested on the personal responsibility of Isaac, but he afterwards actually gave bond with security, which was cancelled when he reconveyed. The purchase-money was payable partly down, and partly by instalments. On the 19th of March, 1817, Isaac conveyed a moiety to Jacob for one-half of the original consideration; on the next day, they both conveyed a portion of the land to George Lantz, in satisfaction of his share. On the 2d of April, 1822, Isaac conveyed to Jacob the residue, for the consideration of three thousand five hundred dollars. Thus Jacob, if the sale was not a nullity, became the owner of the whole on the 2d of April, 1822. On the first of April, 1818, 1819, and 1820, respectively, portions of the purchase-money became due. In April, 1818, Jacob Lantz paid to the children of the testator, except John, the proportions then due to them under this sale. On the 16th of April, 1818, the widow received five hundred and twenty-seven dollars and thirty-two cents. The legatees received what was due to them in 1819 and 1820. Thus the sale was ratified by the legatees. It was after this ratification that Isaac conveyed to Jacob. Eight years elapsed after the death of the testator before Best brought any suit on his bond. The bond was a joint and several bond, given by Peter Lantz and Peter Sailor to John Lantz, who assigned it to John Best. The creditors of Jacob Lantz desired Best's executors to transfer the bond to them, which was refused. Having shown, that there was no equity in the legatees, or the creditors of Peter Lantz, we approach the points involved in the case.

1. Had the plaintiff a right to have execution of the lands in question, as the estate of Jacob Lantz? If, at the time the judgment was obtained, he had any estate, discharged from the lien of the debts of the deceased, the plaintiff had a right to take it in execution. If, on the other hand, the estate continued to be that of Peter Lantz, he had no such right. A sale under the will, had the effect of discharging the land from the lien of the testator's debts, and substituting the proceeds of sale as a fund for their payment. It was not the case of a power to sell for legacies, but a general order to sell for the purposes of the will, to pay both debts and legacies; and in this respect, it differs from *Hannum v. Spear*. That such was the intention of

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the testator, is deducible from the *whole tenor of the will, in which, nothing is said about payment of debts [*415] out of the personality, and there is no evidence of its sufficiency for that purpose. In England, the provisions of this will would subject the land to the payment of simple contract debts. If the power was to sell both for debts and legacies, the purchaser held it discharged, and was not bound to look to the application of the purchase-money. *Grant v. Hook*, 13 Serg. & Rawle, 263; *Rambler v. Osgood*, 1 Johns. Ch. Rep. 1; 14 Johns. Rep. 587; 1 Salk. 152; Co. Litt. 290, b. note, 249; *Rogers v. Skillincorne*, Amb. 188; Sugd. on Vend. 332.

2. As to the execution of the power, it is conceded, that if it was a nullity, it produced no fruit. Taking it for granted, however, that Jacob was interested in the purchase, there is no authority to show, that the sale was therefore void. It certainly was not void at law. The trustee purchaser can be held to his bargain, and if relief be sought against him, it is, in equity, to declare him a trustee. But before the sale can be rescinded, what the purchaser has paid should be tendered to him. The principle by which such cases are governed is, not that the trustee shall not buy, but that he shall not buy to make advantage. Here a very high price was given for the estate. 3 Ves. 740; Madd. Ch. 110, 112, 114; *Lazarus v. Bryson*, 3 Binn. 54, 62. At law, Isaac Lantz was a purchaser under a power in the will; and Jacob was at law a purchaser from Isaac. The only persons who had a right to object, were the legatees of the testator, and they have all ratified the proceeding. Suppose the power had been to sell for the purpose of making a division, and the estate had been put up by the executors, with the consent of the legatees, and purchased by the executors, can it be doubted the sale would be good? And subsequent confirmation is equivalent to original consent. The party objecting is the creditor of the testator, and he has no right to do so. His lien on the land was discharged by the operation of the act of assembly of the 4th of April, 1797, Purd. Dig. 533, which limits the lien of the debts of a decedent to seven years. Eight years had elapsed after the death of Peter Lantz, before the plaintiff commenced his suit. It cannot be pretended, that an executor or trustee can in no case be a purchaser.

It is objected, that no security was given, and that the want of it vitiated the sale. By the will, the executors were to take "security to their satisfaction;" and a similar stipulation was made in the conditions of sale. Such security they took in the bond of Isaac with surety. Upon the whole, the sale was valid.

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It might have been questioned, but stands good for want of having been questioned by those who had a right to do so.

The opinion of the court was delivered by

ROGERS, J.—At a very early day, the legislature departed so far from the English system of jurisprudence, as to make all [*416] debts of *what character soever, chargeable on the real and personal estate of the debtor. Under the act of assembly of 1705, the real estate of debtors has been held liable to sale by execution, whether they be living or dead; if living, under a judgment and execution against themselves; if dead, under a judgment and execution against their heirs, executors, or administrators. Debts, whether by simple contract or otherwise, were decided to be a lien on the real estate of the deceased, in the hands of an alienee, as in *Graff v. Smith's Administrators*, 1 Dall. 482, where it was ruled, that lands of a deceased person were bound for the payment of his debts, and might be taken in execution, although the heir or devisee, may have sold them to a *bona fide* purchaser. As this produced inconvenience, the legislature passed the fourth section of the act of 1797, in which they recite the mischief intended to be remedied, with a reference, as I conceive, to the decision of the court in the case to which I have referred.

“Whereas inconveniences may arise from the debts of deceased persons remaining a lien on their lands and tenements, an indefinite period of time after their decease, whereby *bona fide* purchasers may be injured, and titles become insecure, therefore, be it enacted, ‘That no such debts, except they be secured by mortgage, judgment, or recognisance, or other record, shall remain a lien on the said lands and tenements, longer than seven years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his or her heirs, executors, or administrators, within the said period of seven years; or a copy or particular written statement of any bond, covenant, debt, or demand, when the same is not payable within the said period of seven years, shall be filed within the said period in the office of the prothonotary of the county where the lands lie.’”

Independently of this act, the title of the terre tenant would clearly be good, because the real estate must be first applied to the payment of the debts of the deceased, rendered liable by prior enactments, to be taken in execution and sold, without limitation in point of time, even in the hands of a *bona fide* purchaser. The debts would be a continuing and subsisting lien up to the time of the sale, to the terre tenant. It becomes, then,

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necessary to inquire, whether such proceedings have been had, as to divest the right of the creditors of Peter Lantz to look to the real fund for payment of debts. The title of Jacob Lantz depends upon a sale by the executors, in pursuance of a power in the will of the deceased; and I will assume, that the will authorized the executors to sell; and that so far as respects the *indictum* of execution, the power has been regularly pursued, and that the sale has been ratified by the devisees and heirs. It appears in evidence, that Jacob Lantz, one of the executors, was a joint purchaser, and that he afterwards became, and at the rendition of the judgment against the executors of Peter Lantz, was the *sole owner of the estate. Is he, then, such a [*417] purchaser as is contemplated by the fourth section of the act of assembly of 1797? Although in *The Lessee of Lazarus v. Bryson*, 3 Binn. 58, the late Chief Justice says, that a purchase by a sheriff, where he is buyer and seller, is void; yet, I agree with the counsel, that the title of the executor was not void, but voidable. The power in the will constitutes the executors trustees for the devisees and heirs; the general law, with the devise, trustees for the benefit of the creditors. The creditors have an interest in the fund, paramount to the title of the devisees and heirs, and independent of the will of the testator. Where, then, the executor, or a trustee, becomes the purchaser, he takes it clothed with the same trusts as it was liable to in his hands previous to the sale. The law will not endure, that a sham sale, or one against public policy, shall create a right in prejudice of creditors, who have liens upon the land; nor should their rights be impaired without an express assent on their part. The creditors should still, notwithstanding a pretended sale or transfer, which may be a mere cover to fraud, be at liberty to pursue their remedy against the executors, and upon judgment and execution to sell the land, as they would have an unquestionable right to do, if it were in the possession of the heirs or devisees; nor does this contravene the principle of *Grant v. Hook*, 13 Serg. & Rawle, 259, that where the testator authorized his executors to sell as much of his real estate as should be necessary to pay his debts and educate his minor children, the executors had power to sell the real estate of the testator free from the incumbrance of his debts, and the purchaser was not bound to see to the application of the purchase-money. And this is doubtless the law, taken with the qualification, that the purchaser is not both buyer and seller; for it would be highly unreasonable, that the purchaser, who is a stranger, shall be answerable for the misconduct of the executor, arising from a misapplication of the

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purchase-money. He is not expected to see to the observance of a trust, unlimited and undefined. But where the executor becomes the purchaser, the reason does not exist, and I cannot perceive the justice in his favour, or for the benefit of his creditors, of divesting the lien against the real estate, and turning it into a personal right against the fraudulent trustee. I say fraudulent trustee, for the law so regards him as having acted in contravention of public policy. It would be unwise to throw such a temptation in the way of executors and heirs, who by combination and fraud, may affect the rights of creditors. Such a consequence of the power to sell does not accord with the spirit of our laws.

Great reliance is placed on the fact, that at the commencement of the suit against the estate, more than seven years had elapsed from the death of Peter Lantz. It must be remembered, that the act of 1797, does not create, but limits the lien. Accordingly, it has always been held, that the lien does not cease [*418] to exist, except *as against *bona fide* purchasers, for the generality of the enacting clause is restrained by the preamble. The lien of the creditor still continues, unless divested by a sale to a person, who stands in that situation. The argument is, that the sale is voidable; and I agree that it is, and that the devisees or heirs, have validated the sale by the acceptance of their respective shares of the purchase-money. As against those who have received their money in whole or in part, with a full knowledge of the transaction, the sale would operate as a legal transfer, by force of the subsequent assent; for it would be against equity for them, under such circumstances, to dispute its validity. But although it is clear, that they can affirm the sale, yet, it is equally plain, that each can affirm the sale only for himself. And if this is the case, as respects the heirs or devisees, whose titles are co-ordinate, how much more forcibly does the principle apply to creditors who claim paramount to the devisees, and whose lien covers the whole fund. The creditors of Peter Lantz have done no act which can be tortured into an affirmance of the voidable title of the executor. So far from assenting to the sale, they elect to proceed against the fund, primarily liable for their debt. Jacob Lantz had it in his power to vest a complete title in himself, by payment of the creditors. But this he has neither done, nor offered to do. As there has been, then, no such absolute transfer of the title, as the law recognizes, the creditors have a right, and this they have done, to consider the land in the same situation it was when Peter Lantz died; and if so, their lien continues unaffected by lapse of time. The purchase by a trustee,

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of the interest of the *cestui que trust*, has always been viewed with great jealousy. They are not allowed to purchase the trust property, because, from their situation, and the knowledge it enables them to acquire, they may be induced to commit a fraud upon their *cestui que trust*. It is not necessary to show, that the trustee has made an advantageous purchase, or that there was fraud. The law has prohibited it altogether, to prevent the temptation to which the interest of the *cestui que trust* would necessarily be exposed. The rule has been wisely adopted to prevent fraud; and as I am opposed to any relaxation, I am of opinion, in which I have the concurrence of a majority of the court, that the judgment be reversed, and a new trial awarded.

GIBSON, C. J.—It seems to me, the verdict ought not to be disturbed. Whether Best's lien, under which the defendant purchased, were originally divested by a valid execution of the power or not, it is certain that when he instituted his action, it had expired by efflux of time, and was extinct to every intent and purpose. I take this species of lien to be analagous to that of a judgment, which ceases at the end of the prescribed period, without regard to considerations derived from the absence of actual notice, as was held in *The Bank of North America v. Fitzsimons*, 3 Binn. 342. To remove all *uncertainty [*419] on this head, the legislature has declared record notice to be indispensable; and after a declaration so explicit, it seems to me, we can substitute nothing else. The laws have heretofore fostered the freedom of alienation, which habits of enterprise, unparalleled in any other people, have rendered essential to the well-being of society. Even the lien of a judgment, although it may be matter of record, is not tolerated beyond a period of shorter duration than is assigned to this unregistered lien of a decedent's debt. It would, therefore, be against the spirit of legislation, evinced in parallel cases, to extend it by implication. The plain intent was to allow the creditor a period, in the first place, sufficient in all reason, for the assertion of his claim; and after that, to hold him strictly to record notice. At the institution of Best's action, the lien of his debt was gone. Nor was it prolonged by the provisions of the will. As regards legacies, blending the real with the personal estate, so as to constitute one entire fund, subjects the land to the burdens of the personal assets. But such a blending, uncoupled with an express direction, is insufficient to charge the land with the debts. In England, frequent ineffectual attempts have been made to induce the parliament to declare simple contract debts to be a

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charge by law. But the evil resulting from the want of such a provision, has been much lessened by the frequency of testamentary provisions for payment of debts; and these are consequently interpreted as liberally as the words will bear. Yet it was long doubted, and is perhaps not yet settled, whether a general direction to pay in the first instance, renders the debt a charge. With us, every species of debt is charged for a limited time by act of the legislature; still, the English cases are authority to show, that the blending of the two funds is not sufficient, *per se*, to place the creditors on higher ground than is assigned to them by the laws. In the will before us, the whole estate is thrown into a common fund, for purposes of distribution among the children; not one word being said about the creditors, who are, therefore, left to their legal rights. Then the lien of Best's debt having been gone at the institution of his action, it remains to inquire, whether the execution of the power can be questioned by a purchaser under the judgment, and whether the reconveyance to Jacob Lantz, together with the extinguishment of the claims of the other children, does not constitute him a purchaser of at least an undivided interest in the estate. If the affirmative be made out, it will follow, that nothing but his own share was subject, as the estate of the decedent, to Best's execution.

It must be admitted that the power was defectively executed in equity, and perhaps, even at law. Jacob Lantz was a secret purchaser at his own sale, and on the reconveyance of the ostensible purchaser, chancery would undoubtedly have declared him a trustee for those beneficially entitled under the will. But nothing is clearer, than that they might ratify in equity an execution of the power good *at law; and for this purpose, [*420] nothing was necessary but an act *in pais*, that should satisfactorily indicate their assent. So, if the power were executed defectively at law, or not at all, they were competent to waive the execution of it altogether, and take the land itself, instead of the price. The doctrine on this point is stated in *Craig v. Leslie*, 3 Wheat. 563. It seems to me, that by extinguishing the claims of his brothers and sisters, Jacob Lantz became the equitable owner of the whole estate, and that choosing to dispense with the execution of the power, as useless, the estate is in him by operation of law. I lay out of the case all consideration of his having been an executor. Different rights in an individual, are to be treated *reddendo singula singulis*, as if they existed separately in different persons. Had he been a trustee of the land for the creditors, they might perhaps have been entitled to the benefit of his purchase; but I think, it is clear, they had not

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a particular interest under the will. As a tenant in common with his brothers and sisters, I know of no rule of law to prevent him from purchasing their estates. Take it, that the transaction is to be scanned more narrowly than if it were with a stranger; still, if it were *bona fide*, and not to elude the debts, it is not easy to see why it shall be deemed fraudulent for reasons of policy. If it were fraudulent in fact, that might be shown; but actual fraud is not pretended, and if a tenant in common may, in any case, be a purchaser of the estates of his co-tenants, Jacob Lantz is such. To the validity of his title, they have precluded themselves from objecting, and they do not object. What right, then, had Best, who had no interest in the land, equitable or legal, to object; or have execution of it in the hands of one who had paid for it? I admit, that the share of Jacob Lantz, himself, for which he paid nothing, passed by the levy and sale to the defendant; but, it seems to me, the shares of the other children are bound by the plaintiff's judgment, and liable to execution; the *quantum* of their interest to be determined in an action of partition between the defendant and the purchaser.

TOD, J., having been unwell during the argument, took no part in the decision.

Judgment reversed, and a new trial awarded.

Cited by Counsel, 3 R. 190; 1 Wh. 373; 5 Wh. 323; 9 W. 174; 7 W. & S. 153, 401; 9 W. & S. 15; 7 Barr, 425; 1 J. 209; 2 J. 70, 298; 12 C. 17; 1 S. 201.

Cited by the Court, 2 W. 60; 7 W. 337; 9 Barr, 207; 10 Barr, 272; 4 Wright, 414.

Approved, 9 Barr, 298, as to the point that a sale from an executor to himself is voidable and not absolutely void.

This case was distinctly overruled by *Kerper v. Hoch*, 1 W. 9, on the point that the limitation of the lien of a decedent's debts protected only purchasers and not heirs and volunteers. *Kerper v. Hoch* declared the statute (1797) to be one of limitation and repose, the end of which was to render titles secure as well as to protect purchasers. This doctrine has not since been shaken, and the law stands that the debts of a decedent cease to be a lien at the expiration of five (formerly seven) years after his death. The doctrine of *Bruch v. Lantz* was firmly rooted in the mind of the profession, and many attempts were made to induce the Supreme Court to return to it, but they were unavailing. See 2 W. 53; 6 W. 22, 32; 1 W. & S. 293; 6 W. & S. 118; 5 Barr, 103. These authorities were all reviewed by George W. Biddle, Esq., in an address before the Law Academy of Philadelphia, 1854.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1830.

[PHILADELPHIA, MARCH 27, 1830.]

Case of a Road from the West Chester Road to a Road
Leading from the Borough of Chester to Germantown.

CERTIORARI.

Though road viewers are restricted to the space between the points specified in the order, yet they may carry the road to the point designated, partly over the bed of a road already laid out and opened.

CERTIORARI to the Court of Quarter Sessions of *Delaware* county.

In this case the petitioners prayed for a road to be laid out from the West Chester road, at the intersection of a road leading from the falls of Schuylkill, to intersect the road leading from the borough of Chester to Germantown.

The viewers laid out and reported a road according to the prayer of the petitioners, which report was set aside on the report of reviewers, that the said road was unnecessary. Reviewers were then appointed, who reported a road from the West Chester road to the Garratt, or Marshall road, and along the middle of the said road, a distance nearly equal to all the remainder of the road reported, to the intersection of the said Garratt road, with the road from the borough of Chester to Germantown.

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*The parties who took the *certiorari*, objected to the confirmation of this report: [*422]

"1. Because the road, as reported, is essentially different from that set forth in the petition, and passes through the property of persons who had no notice by the tenor of the petition or otherwise, that a road was contemplated to affect them.

"2. That the road laid out by the re-reviewers is entirely different from that laid out by the viewers.

"3. That a very large proportion of the road laid out, is through the middle of the Garratt, or Marshall road, which has long been a public road."

Chew and Tilghman, argued in support of the exceptions.
Edwards, contra, was stopped by the court.

The opinion of the court was delivered by

GIBSON, C. J.—By the terms of the order, viewers are restricted to the space between the specified points. Without assuming such points, the projected road could not be designated, or the duties of the viewers described with convenient certainty. Where, however, they are injudiciously assumed, a reasonable exercise of discretion by the viewers cannot but be beneficial, and it ought to be allowed whenever it is strictly consistent with the terms of their authority. Here, the viewers may be said substantially to have shifted the terminus to a more convenient point in the road called for; yet, they have strictly conformed to the terms of the order, by actually carrying the road for a part of the way to the point designated, on the bed of that road. To reconfirm a part of a road already laid out and opened, may be unnecessary; but what harm will it do? I can imagine none. To say that viewers shall not adopt any part of a road already laid out, further than to cross it, would be intolerably mischievous where the only practicable route, for a part of the way, should be through the gap of a mountain already occupied. The confirmation of this part of the road, then, can have no other than a beneficial effect in enabling the viewers to reach the point proposed in the way least burdensome to the public, and at the same time, consistently with the letter of their authority.

HUSTON, J., and TOD, J., were absent in consequence of sickness.

Proceedings confirmed.

Cited by Counsel, 1 Barr, 354; 3 H. 398; 9 H. 219, 358; 8 S. 67; 30 S. 161.
Commented on and qualified, 5 Wh. 335.

Cited by the Court, 5 W. & S. 204; 8 Barr, 485; 10 N. 218.

[*423]

*[PHILADELPHIA, MARCH 27, 1830.]

Snyder *against* Vaux.

IN ERROR.

If, in replevin for trees cut down upon the plaintiff's land, the court be requested by the defendant to charge the jury, that if they believe he cut the trees in question, under a claim of property in the soil whereon they grew, the plaintiff is not entitled to recover; and it matters not, whether the claim were well or ill founded, it is sufficient to say, that if the jury believe that the defendant was in possession of the land from which the trees were cut, under a claim of title, the action could not be maintained; but if they believe he was not in possession, nor had either title, or claim of title, then the action was well brought, and the plaintiff was entitled to recover; and such answer is correct in point of law.

If trees cut down upon the plaintiff's land be converted by the defendant into rails and posts, this is not such an alteration of the property as will prevent the plaintiff from recovering in replevin.

WRIT of error to the Court of Common Pleas of *Northampton* county, in an action of replevin, brought by George Vaux, the defendant in error, against Godleib Snyder, the plaintiff in error, for taking and unjustly detaining ten thousand chestnut rails, of the value of three hundred dollars, and three thousand chestnut posts, of the value of two hundred dollars.

The sheriff returned, "replevied as to part, to wit: three thousand three hundred and seventy-nine chestnut rails, and two hundred chestnut posts, and forty-two stakes; and not found as to the residue, and delivered to the plaintiff."

The plaintiff declared for ten thousand chestnut rails, and three thousand chestnut posts, of the value of seven hundred dollars, which the defendant took, and unjustly detained against sureties and pledges, &c.

The jury found a verdict, "for the plaintiff for the rails and posts replevied, and five dollars damages for the unjust taking and detention, and full costs of suit."

The court below entered judgment for the plaintiff, and that he recover his damages for the taking and unjustly detaining, &c., with full costs, &c.

On the trial of the cause, the following points were propounded to the court by the counsel of the defendant below:—

"1. That if the jury believe that the defendant cut the trees in question, under a claim of property in the soil whereon the trees grew, the plaintiff is not entitled to recover; and if that claim were really made, it matters not whether the claim were well or ill founded.

"2. That if the trees were split into rails and posts, and thus

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*their character and identity altered, the plaintiff cannot maintain replevin." [*424]

Answers of the court to the points propounded :—

"To the first point, the court answers, that if the jury believe, that the defendant was in possession of the land from which the trees were cut, under a claim of title, then this action of replevin cannot be maintained; but if the jury believe, that the defendant was not in possession, nor had either title, or claim of title, then this action is well brought, and the plaintiff is entitled to recover; for certainly replevin is not the proper form of action to try title to land *ex directo*, though incidentally, title in such action may be called in question; it is to try the title to personal property, and not to real estate. Replevin cannot be maintained by one not in the actual exclusive possession, whatever his title may be, against one who is in the possession claiming right. In the matter now before us, the possession was not vacant; if the defendant was not in possession, the plaintiff, the admitted owner of the title to this woodland, was in the constructive actual possession.

"To the second point, the court answers, that making trees into rails and posts, is not such an alteration of the property as to prevent the plaintiff from recovering them in replevin."

The following errors were assigned in this court :—

"1. That the declaration is defective in not setting forth, that the defendant detained the goods and chattels, &c., until they were delivered to the plaintiff by the sheriff, &c., and in counting for more than the sheriff replevied, and delivered in virtue of the writ.

"2. That the sheriff replevied and delivered to the plaintiff, forty-two stakes, which are not mentioned in the writ; and there is no award of *retorno habendo* to the defendant for the said stakes.

"3. That the court did not answer the first point propounded by the counsel of the plaintiff in error, who was defendant below; and so far as the same is answered, the answer is erroneous.

"4. That the answer of the court to the second point is erroneous."

Brooke and Porter, for the plaintiff in error.

1. The declaration is neither in the *detinet* nor *detinuit*. It sets forth no cause of action. The injury complained of should be correctly set out according to the truth. The court could not tell whether the property replevied, was delivered or retained on a claim of property. The defect is not matter of form but of substance, as it affects materially both the damages and the form of the verdict and judgment. It, therefore, is not cured by

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verdict. 2 Chitty Pl. 412 ; 5 Jacob's Law Dict. 489 ; Replevin, Sect. 3.

2. The declaration does not correspond with the writ. 1 Saund. 318, note ; Easton v. Worthington, 5 Serg. & Rawle, 130.

[*425] *3. The court did not answer the first proposition submitted by the defendant below. The question proposed was, whether, if the defendant entered and cut down the trees, claiming title in any one, himself, or any one else, adversely to the plaintiff, the plaintiff was entitled to recover. The court said, that he must enter under colour of title in himself ; and almost said, he must show a good title. Snyder did not claim title in himself, but denied the title of the plaintiff below. In no instance will replevin lie for trees cut down upon the land, for it necessarily involves the question of title to the land itself. To establish a title to the trees, the first step must be, to show title to the land on which they grew ; and nothing is better settled, than that the title to real estate cannot be tried in replevin, or any other personal action. Mather v. Trinity Church, 3 Serg. & Rawle, 509 ; Brown v. Caldwell, 10 Serg. & Rawle, 114 ; Baker v. Howell, 6 Serg. & Rawle, 476 ; Irvine v. Hanlin, 10 Serg. & Rawle, 220. The defendant below was in the actual, exclusive possession at the time the trees were cut down. The land was vacant, and the moment he entered, he was in the actual possession ; he had the *possessio pedis*, which gave him the right to retain the timber he had cut, leaving the plaintiff below his remedy by action of trespass, *quare clausum fregit*. It is important to the merits of this case, that the proper forms of action, established by the wisdom of ages, should be preserved. If trespass had been brought, the damages would have been only the value of the timber in its rough state, and the defendant below would not have lost his labour, unless the trespass was wantonly committed ; but by replevin, the plaintiff gets the timber after the defendant's labour has altered its form, and given it an increased value. The defendant went on the land innocently believing it to be actually vacant, and ought not to lose his labour.

4. The court below erred in saying, that the property was not so altered as to prevent a recovery by the plaintiff. If he had any property in the trees, it attached at the moment they were cut down, and the character of the property was afterwards changed. It must possess the same character at the time of the replevin that it had when the right attached. Upon the opposite principle, if a cow has been taken, the owner may have replevin for the hide, or even for the leather, after it has been made into shoes, or replevin may be maintained for wood after it has been made into barrels, tubs, or churns, and mixed with

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other wood. The question is, whether the property has been so altered, that a person who knew it before the alteration, would not know it afterwards. The party who sues out a replevin, is bound to show the property to the sheriff, which could not be done in the present instance. No case can be found, in which replevin has been sustained, where the property has been altered. Trespass and trover differ materially from replevin, the former being for the recovery of damages, and the latter for the identical thing taken. 6 Bac. Ab. 69; Moore, 394; 2 Brownl. 139; *5 Jacobs' Law Dict. 487. Instances, therefore, in [*426] which trespass or trover have been maintained, where the property has undergone a change, have nothing to do with the present question.

Chouncey, for the defendant in error, who was requested by the court to confine himself to the third and fourth points made by the counsel of the plaintiff in error, observed, in respect to the third, that the judge did answer the question submitted to him fully and rightly, and almost in the words of the Supreme Court in *Brown v. Caldwell*, 10 Serg. & Rawle, 114. The court below did not say, that the defendant must show title, or anything like it; but merely, that if the defendant was not in possession, and had neither title nor claim of title, this action could be maintained. This is clearly right. Title is not necessary to be shown, but merely possession. Here the defendant did not even assert a title; he was a mere trespasser, and could acquire no title by his trespass. The plaintiff, on the other hand, being the undisputed owner of the land, was in constructive, actual possession of it; the possession, in contemplation of law, always accompanying the title, unless there is an actual, adverse possession.

4. The rule is, that replevin will not lie where the property has undergone an essential change in its character, so that its identity cannot be shown; but where the essence of the thing remains, though the form be changed, this action can be supported. The cases put by the opposite counsel, and in the books, in which it will not lie, are extreme cases, in which the property has been made up into something else, and totally lost its original character. This has been the law from very ancient times. *Udal v. Udal*, *Alleyn*, 82, 3d Resolution; Moore, 19, 20; 20 Vin. 419; *Cro. Car.* 242, 274. This rule has been acted upon repeatedly in New York, in cases of trespass and trover, in which the principle is exactly the same as in replevin. 5 Johns. Rep. 348; *Curtis v. Groat*, 6 Johns. Rep. 168; *Babcock v. Gill*, 10 Johns. Rep. 287; 7 Cowan's Rep. 95. No question of title can possibly arise in this case, for the defendant below admits,

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that he was a trespasser, and the plaintiff the owner of the soil. Unless, therefore, the defendant can acquire a title by his trespass, and bestow his labour on what was not his own, this suit may be maintained.

The opinion of the court was delivered by

SMITH, J.—The defendant in error brought an action of replevin against the plaintiff in error, for taking and detaining ten thousand chestnut rails, and three thousand chestnut posts, together of the value of five hundred dollars. A part only of the rails and posts were replevied and delivered to the plaintiff, for which the jury found for him, with five dollars damages for the unjust taking and detention, and full costs of suit, whereupon the court rendered judgment. The defendant below, on the trial, requested the court to charge the jury, that if they believed that he cut the trees in question, *under a claim [*427] of property in the soil whereupon the trees grew, the plaintiff was not entitled to recover, and if such claim were really made, it mattered not whether it were well or ill founded. Secondly, that if the trees were split into rails and posts, and their character and identity were thus altered, the plaintiff could not maintain replevin. The court, after submitting the facts to the jury, instructed them, that if they believed that the defendant was in possession of the land from which the trees were cut, under a claim of title, then this action of replevin could not be maintained; but if they believed, that he was not in possession, nor had either title, or claim of title, then this action was well brought, and the plaintiff was entitled to recover. And thirdly, the court answered, that making trees into rails and posts, was not such an alteration of the property as to prevent the plaintiff from recovering them in replevin.

The errors assigned, and insisted on, relate to these instructions of the court. It is alleged, that the court did not answer the first point propounded, and so far as the same was answered, the answer was erroneous, and that the answer of the court to the second point was also erroneous. I think the first point was answered fully and correctly. The court took the long and well-settled ground, that title to land could not be tried in an action of replevin, *ex directo*, although it may sometimes incidentally come in question; and, therefore, if the trees had been cut, under an actual claim of title, it would have been necessary for the injured party to pursue a different remedy; but if the defendant had neither possession, title, nor claim, he was a mere trespasser, and the plaintiff had an undoubted right to recover. Thus the court sufficiently answered the legal proposition involved in the point, referring the matter of fact to the jury.

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2. But it is contended, that the trees cut had been changed into rails and posts, and their identity so altered, that replevin could not be maintained. The cases cited by the plaintiff in error, do not support the doctrine contended for. A wilful trespasser cannot acquire title to property, merely by changing it from one article into another, as by working trees cut down into shingles, or into cord wood, logs or rails. And that the law has been so from time immemorial, is evident from the year books, where it is said, that whatever alteration of form any property may undergo, the owner thereof may take it in its new shape, provided he can prove the identity of the original materials; as if leather be made into shoes, cloth into a garment, trees squared into timber, or iron made into bars. And the same doctrine is recognised in modern cases. See 5 Johns. Rep. 340; 6 Johns. Rep. 168; 10 Johns. Rep. 287, and 7 Cowan, 95. It is true, that if the plaintiff fail to prove the identity of the property in question, or in other words, to show that the original materials were the same which belonged to him, he cannot recover; but whether the same or not, is an inquiry into a fact, which falls within the province of the jury. The pernicious *consequences of a different rule, are sufficiently obvious. Should a wilful trespasser be able to [*428] protect himself by any change which he might communicate to the shape or form of the materials, an unbounded license would be given to plunder, and the security of personal property would be exceedingly diminished.

In Pennsylvania, the action of replevin has been liberally extended, and it embraces almost every case of personal property which is in the possession of one person, and claimed by another. It will lie for the rails and posts; sued for in the present suit.

Other errors were assigned, but were abandoned on the argument, and, therefore, need not be considered. The plaintiff, then, in our opinion, has failed to support the errors assigned, and the judgment is, therefore, to be affirmed.

Judgment affirmed.

Cited by Counsel, 6 Barr, 394; 9 H. 361; 4 Wright, 253; 5 S. 173; 4 N. 257, s. c. 5 W. N. C. 72.

Cited by the Court, 10 W. 342; 5 S. 178.

[PHILADELPHIA, MARCH 27, 1830.]

Moser *against* Libenguth and Another, Administrators
of Libenguth.

APPEAL.

A joint bond cannot, as against a surety, be shown to have been made so by mistake, instead of a joint and several bond, by evidence *dehors*, unless the evidence leave no doubt, that a mistake, in point of fact, has been committed, and the instructions of the parties departed from.

APPEAL by the defendants from the decision of Smith, Justice, holding a Circuit Court for *Montgomery* county, on the 1st of March, 1830.

The action was debt, brought by Peter Moser against Eve Libenguth and John Libenguth, administrators of Jacob Libenguth, deceased, on a bond, dated 2d of April, 1821, given to Peter Moser by Joseph Libenguth, and the said Jacob Libenguth, the intestate. This bond was decided to be a joint bond, for which decision, and the form of the bond, see 1 Rawle, 255. The cause was tried again on the plea of payment, with leave to give the special matters in evidence, *non est factum*, and the following plea, viz.: "That the writing obligatory, if any such was sealed and delivered, by the said Jacob Libenguth, was sealed and delivered jointly, with one Joseph Libenguth, who is still living, to wit: at the county of Montgomery, and not by the said Jacob Libenguth, alone."

The plaintiff replied, *non solvit* and issues, and "That the plaintiff ought to have his action, &c., anything in the aforesaid plea notwithstanding; and that the said writing obligatory, in [*429] the *declaration mentioned, was sealed and delivered by the said Jacob Libenguth, jointly and severally with the said Joseph Libenguth."

William Mintzer, one of the subscribing witnesses, after having proved the execution of the bond, testified, "That he filled up the bond at the request of Moser and the Libenguths: That in doing so, he acted as the agent of both parties: That Joseph got the money from Moser, and Jacob, the father went security: That the parties did not give him any instructions whatever, in what manner Jacob Libenguth was to be bound: That he received no instruction from either of the Libenguths, except that Jacob was to go security for the money, and he was told to fill up the bond in the usual form: That he had filled up a number of bonds for Moser, in some of which there were

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sureties : That he received no instructions to make this a joint bond from either of the parties : That he received no instructions to make it a joint and several bond ; none from either party, one way or the other : That he read it to the parties, but doubted whether they understood it ; they were all Germans : That he explained the amount of the bond to them, and the suretyship, and when it was to be paid, and that both were bound : That from the instructions he received from both parties at the time, he intended to bind them jointly and severally ; that is, if Joseph Libenguth was not able to pay the money, Jacob should : That Joseph was considered insolvent a number of years back ; in 1825 or 1826, his property was sold by the sheriff : That he did not read the bond to them in German, but explained it, and he had no doubt they knew what they were about when they signed the bond : That the instructions were to draw up the bond in the usual way in which he had done so for Mr. Moser : That in drawing bonds, he generally put in the words jointly and severally, and he could not account for not having put in the word severally in this instance, except that the line was filled up : That it was in the presence and hearing of old Mr. Libenguth, that he was told to fill up the bond in the usual way : That this instruction referred to its being paid in gold or silver ; but whether it referred to that alone, he could not say."

The evidence being closed, His Honour charged the jury : "That they were to consider whether any circumstances had been given in evidence, to show, that the original intention of the parties was, that the bond should be joint and several : That they must be satisfied from the evidence, that such was the intention : That if they were satisfied that it was the intention of the parties that it should be different from what it was, the plaintiff must recover : That it was for the jury to say, whether Jacob Libenguth intended it should be a joint bond ; if he did intend it, he must have known that his estate would not be bound after his death, which was more than many lawyers knew : That if, from the circumstances, they believed it was a mistake of the scrivener, and the parties intended the bond should be joint and several, and not joint, it was their *duty to [*430] find for the plaintiff ; and if the evidence struck them as it struck him, old Mr. Libenguth did not believe or think his estate would be exonerated from the payment of this bond after his death. If, however, the jury thought differently, they would find for the defendants."

The jury found a verdict for the plaintiff, upon which the defendants moved for a new trial ; and the judge having overruled the motion, they appealed.

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The cause was argued by *Rawle, Jr.*, for the appellants, who cited, 1 Phill. Ev. 511; *Gillespie v. Moon*, 2 Johns. Ch. Rep. 596, 597; *Lyman v. The United Insurance Company*, 2 Johns. Ch. Rep. 633; *Christ v. Diffenbach*, 1 Serg. & Rawle, 465; *Cozens v. Stevenson*, 5 Serg. & Rawle, 423, 426; *Iddings v. Iddings*, 7 Serg. & Rawle, 114; *Heagy v. Umberger*, 10 Serg. & Rawle, 342; *Besore v. Potter*, 12 Serg. & Rawle, 160; 1 Madd. Ch. 60; *Lyon v. Richmond*, 2 Johns. Ch. Rep. 51; *Heilner v. Imbrie*, 6 Serg. & Rawle, 411; *M'Williams v. Martin*, 12 Serg. & Rawle, 269; *Weidler v. Farmers' Bank*, 11 Serg. & Rawle, 134; *Deal v. McCormick*, 3 Serg. & Rawle, 344; *Weaver v. Shryock*, 6 Serg. & Rawle, 264; *Fisher v. Larick*, 3 Serg. & Rawle, 319.

Kittera, for the appellee, referred to, and commented on the authorities cited against him, and cited, *Marshall v. De Groot*, 1 Caines' Cases in Err. 122.

The opinion of the court was delivered by

GIBSON, C. J.—In 1 Rawle, 255, this bond was determined to be joint, because the positive intent of the parties, as expressly declared in the penal clause, could not be controlled by an adverse implication, which might otherwise have been made from the words of the condition. The attempt now, is to establish the existence of accident and mistake, by evidence *dehors*; but although an instrument may undoubtedly be reformed on parol proof, yet, where, as here, the relief sought is adverse to the pre-existent equity of a surety, the evidence should be so clear as to leave the fact without the shadow of a doubt. Where, indeed, the deceased obligor was the principal debtor, mistake will, it seems, be presumed from the naked relation of the parties; but, whether of fact, as regards the words inserted, or of law, as regards their effect, is nowhere said; relief being granted to prevent a failure of justice, and substantially, on the foot of an equity arising from actual receipt of a benefit. It has, indeed, been intimated by authority eminently entitled to general respect, that mistake in point of law, is an available ground to reform the instrument, independently of fraud and imposition, or the relation of the parties. *Hunt v. Rousmanier*, 8 Wheat. 174. That point is not before us, and at present, it is proper to say more than that the principle seems to be unsupported by authority or analogy; and that it would be pregnant with danger further to [*431] *expose instruments of writing to speculation as to the legal understanding of the parties, and to the hazard and uncertainty of parol proof. In the case at bar, the plaintiff was bound to show a clear mistake in matter of fact; and

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how stands the evidence of it. The scrivener testified, explicitly, that he received no instructions to make the bond joint and several, being barely desired to fill it up in the usual way; but that he, himself, intended to bind the obligors jointly and severally; that is, as he explains it, to bind the surety to pay, in case the principal should not: in other words, that he and the parties were ignorant of any difference between the one form and the other, and if that were a ground of relief it would seldom be wanting. But a mistake of the scrivener, if not common to the parties, would be unimportant, the question being, was anything omitted which was directed to be inserted? The scrivener read the bond to the parties, but doubts whether it was understood. A doubt would be insufficient to rebut the equity of a surety, even if it related to matter of fact, particularly where the person doubting explained the matter to the parties in their vernacular tongue, and says, he entertains no doubt that they knew what they were about. But the doubt, if any, evidently related to the legal effect of the instrument—a circumstance altogether insufficient to sustain a prayer for relief against a surety: but nevertheless, this was obviously the ground on which the jury found for the plaintiff, as the evidence excludes the possibility of mistake in matter of fact. The parties gave no particular instructions, without which it is not easy to see how mistake can be suspected. Having heard the bond read in the English language, in connection with the scrivener's explanations in the German, they adopted its words as their own, and took upon themselves the consequences of their legal effect. The administrators of the surety, therefore, being discharged at law, cannot be charged in equity.

HUSTON, J., and TOD, J., were absent in consequence of sickness.

Judgment of the Circuit Court reversed, and a new trial awarded.

Cited by Counsel, 4 R. 154; 2 Wh. 78; 5 Wh. 62; 4 W. 51, 290; 2 W. & S. 49; 2 J. 51; 12 H. 493; 1 S. 370; 9 S. 222; 18 S. 270.

Approved, 2 W. 416; and commented on, 7 H. 238.

[PHILADELPHIA, MARCH 27, 1830.]

Brodie, Administrator of Lightfoot, *against* Bickley,
Administrator *de bonis non* of Polgreen.

Debt will not lie against an administrator here, on a judgment against a foreign administrator of the same intestate.

THIS action, which was debt on a judgment, obtained in the

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island of Barbadoes, by the plaintiff's intestate, against Susanna D. Polgreen, administratrix of Thomas B. Polgreen, upon whose estate letters of administration *de bonis non* were granted to the [*482] present *defendant, by the register for the probate of wills, &c., for the city and county of Philadelphia, was brought in this court to July Term, 1815.

The case will be best understood from the pleadings. The declaration was as follows:—

“Philadelphia County, ss.

“Of the Term of June, 1815, No. 34.

“Abraham Bickley, administrator *de bonis non* of the goods and chattels, rights and credits which were of Thomas Bickley Polgreen, deceased, unadministered, was summoned to answer David Brodie, administrator of all and singular, the goods and chattels, rights and credits, which were of Samuel Francis Lightfoot, deceased, at the time of his death, of a plea, that he render unto the said David Brodie the sum of twenty thousand dollars, lawful money of the United States, which he unjustly detains from him, and whereupon the said David Brodie, by Benjamin Tilghman, his attorney, complains, for, that whereas the said Samuel Francis Lightfoot heretofore, to wit, at a Court of Common Pleas in and for the island of Barbadoes, and within the jurisdiction of the said court, on the 25th day of February, in the year of our Lord one thousand seven hundred and ninety-two, by the consideration and judgment of the said court, recovered against the said Susanna Dorothy Polgreen, administratrix of all and singular the goods and chattels, rights and credits of the said Thomas Bickley Polgreen, as well the sum of two thousand pounds current money of the said island of Barbadoes, which, in and by the said court, were then and there adjudged to the said Samuel Francis Lightfoot, for the non-payment of a certain debt due upon a certain bond or obligation under seal, made and executed by the said Thomas Bickley Polgreen, on the 5th day of August, in the year of our Lord one thousand seven hundred and seventy-two, to the said Samuel Francis Lightfoot, as also the sum of two thousand pounds, current money of the said island of Barbadoes, for his costs and charges by him about his said suit expended in that behalf, to the said Samuel Francis Lightfoot, by the said court, of his own assent, then and there adjudged, whereof the said Susanna Dorothy Polgreen, administratrix as aforesaid is convict, which said judgment still remains in that court in full force and effect, in nowise satisfied or annulled. And the said David Brodie, in fact saith, that the debt, damages, costs, and charges aforesaid, in form aforesaid recovered, are of great value, to wit, of the

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value of six thousand four hundred and thirty-two dollars, lawful money of the United States, to wit, at the county aforesaid : And that neither he, the said David Brodie, since the decease of the said Samuel Francis Lightfoot, nor the said Samuel Francis Lightfoot, during his lifetime, have obtained execution, or received payment of the said *judgment, or any part [*433] thereof, from the said Susanna D. Polgreen, during her lifetime, or from the said Abraham Bickley, since the death of the said Susanna Dorothy Polgreen, by reason whereof, an action has accrued to the said David Brodie, to demand and to have of and from the said Abraham Bickley, the said sum of six thousand four hundred and thirty-two dollars, above named ; nevertheless, the said Abraham Bickley hath not, (though often requested,) paid the said sum of money, or any part thereof to the said Samuel Francis Lightfoot, during his lifetime, nor to the said David Brodie, since the death of the said Samuel Francis Lightfoot, (to which said David Brodie, after the decease of the said Samuel Francis Lightfoot, to wit : on the 8th day of June, Anno Domini, one thousand eight hundred and fifteen, administration of all and singular the goods and chattels, rights and credits, which were of the said Samuel Francis Lightfoot at the time of his death, who died intestate, was in due form of law granted by the register of wills for the city and county of Philadelphia,) but he, to do so, hath hitherto wholly refused, and still doth refuse, to the damage of the said David Brodie, twenty thousand dollars, and thereof he brings suit, &c. And the said David Brodie brings here into court, the letters of administration aforesaid, &c.”

To this declaration, the defendant put in the following pleas, viz. :—

“1. And the said Abraham Bickley, for a further plea in this behalf, with the leave of the court first had and obtained, according to the form of the statute in such case made and provided, saith, that the said David Brodie ought not to have, and maintain his action aforesaid thereof, against him ; because, he says, that the letters of administration granted to him, the said Abraham, were so granted by the register for the probate of wills, and granting letters of administration in and for the city and county of Philadelphia, to wit : on the 9th day of May, in the year of our Lord one thousand seven hundred and ninety-six ; and that he had not, at any time, and has not now, any other letters of administration ; and that he had not received, administered, or meddled with any goods, chattels, rights or credits, which were of the said Thomas Bickley Polgreen, but such as he might rightfully receive and administer, under the

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said letters : and he further says, that the letters of administration of the said Susanna Dorothy Polgreen, in the plaintiff's declaration alleged, (and under which she was impleaded and sued, and under which she confessed the judgment in the said declaration alleged,) were not granted by the said register, nor by any register for the probate of wills, and granting of letters of administration within the commonwealth of Pennsylvania, nor by any register, or other officer, or person authorized to grant letters of administration in any state, district, or territory, within the United States, but that the same were granted [*434] in parts beyond the seas, out of the *jurisdiction of the United States, and of the state of Pennsylvania, and out of the jurisdiction of all the states, districts, and territories of the United States, to wit : at the island of Barbadoes : without this, that any other letters of administration were ever granted to the said Susanna Dorothy Polgreen, and without this, that any other judgment, as the plaintiff in his declaration has alleged, was rightfully rendered : all which he is ready to verify. Wherefore, he prays judgment, if the said David Brodie, administrator, &c., ought to have, or maintain his aforesaid action against him, &c.

"2. And the said Abraham Bickley, for a further plea in this behalf, with the leave of the court, first had and obtained, according to the form of the statute in such case made and provided, saith, that the said David Brodie ought not to have and maintain his action aforesaid against him ; because, he says, that heretofore, and before the letters of administration of the said Susanna Dorothy Polgreen, granted in the island of Barbadoes, and hereinafter mentioned, to wit : on the 14th day of May, in the year of our Lord one thousand seven hundred and ninety, letters of administration of the goods and chattels, rights and credits of the said Thomas Bickley Polgreen, were duly granted by the register for the probate of wills, and granting letters of administration in and for the city and county of Philadelphia, to one Adam Hubley, and afterwards, and after the death of the said Adam Hubley, to wit : on the 9th day of May, in the year of our Lord one thousand seven hundred and ninety-six, letters of administration of the goods and chattels, rights and credits, of the said Thomas Bickley Polgreen, unadministered by the said Adam Hubley, were duly granted by the said register to the said Abraham Bickley, the letters of administration of the said Susanna Dorothy Polgreen, granted in the island of Barbadoes, being then in full force ; and that he, the said Abraham, had not at any time, and has not now, any other letters of administration ; and that he has not received, administered, or

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meddled with any goods, chattels, rights or credits of the intestate, but such as he might rightfully receive and administer under the said letters: and he further saith, that the letters of administration to the said Susanna Dorothy Polgreen, in the said plaintiff's declaration alleged, were not granted by the said register, nor by any register for the probate of wills and granting letters of administration in the state of Pennsylvania, nor by any register, or other officer, or other person authorized to grant letters of administration in any state, district, or territory, within the United States; but that the same were granted in parts beyond the seas, and out of the jurisdiction of the United States, and of the state of Pennsylvania, and out of the jurisdiction of all the states, districts, and territories of the United States, to wit: at Barbadoes: without this, that any other letters of administration were ever granted to the said Susanna Dorothy Polgreen; and without *this, that any such judgment as the plaintiff in his declaration has alleged, [*435] was rightfully rendered; all which he is ready to verify. Wherefore, he prays judgment, if the said David Brodie, administrator, &c., ought to have, or maintain his aforesaid action against him," &c.

"3. And the said Abraham Bickley, administrator, &c., for a further plea in this behalf, with the leave of the court first had and obtained, according to the form of the statute in such case made and provided, saith, that the said David Brodie ought not to have and maintain his action aforesaid thereof, against him; because, he says, the letters of administration, granted to him, the said Abraham Bickley, were so granted by the register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, to wit: on the ninth day of May, in the year of our Lord one thousand seven hundred and ninety-six, and that he had not, at any time, and has not now, any other letters of administration, and that he has not received, administered, or meddled with any goods, chattels, rights, or credits of the intestate, but such as he might rightfully receive and administer under the said letters; and he further says, that the letters of administration of the said Susanna Dorothy Polgreen, in the said plaintiff's declaration alleged, were not granted by the said register, nor by any register for the probate of wills and granting letters of administration in the state of Pennsylvania, nor by any register, or other officer, or other person authorized to grant letters of administration in any state, district, or territory, within the United States, but that the same were granted in parts beyond the seas, and out of the jurisdiction of the United States, and of the state of Penn-

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sylvania, and out of the jurisdiction of all the states, districts, or territories of the United States, to wit: at Barbadoes: without this, that any other letters of administration were ever granted to the said Susanna Dorothy Polgreen; and without this, that any such judgment as the plaintiff in his declaration has alleged, was rightfully rendered; all which he is ready to verify. Whereupon he prays judgment, if the said David Brodie, administrator, &c., ought to have, or maintain his aforesaid action against him.

“4. And the said Abraham Bickley, for further plea in this behalf, with leave of the court first had and obtained, according to the form of the statute in such case made and provided, saith, that the judgment in the said declaration alleged, so as aforesaid confessed, and rendered against the said Susanna Dorothy Polgreen, as administratrix of the said Thomas Bickley Polgreen, was not rendered under any letters of administration, granted by the register for the probate of wills, and granting of letters of administration in and for the city and county of Philadelphia, nor under any letters of administration, granted by any register, or other officer, or other person, authorized to [*436] grant letters of administration in the *commonwealth of Pennsylvania, or in any state, district, or territory in the United States; but that the said judgment in the said declaration alleged, was confessed and rendered against the said Susanna Dorothy Polgreen, under letters of administration, granted in parts beyond the seas, and out of the jurisdiction of the United States and of the state of Pennsylvania, and out of the jurisdiction of all the states, districts, and territories of the United States, to wit: at the island of Barbadoes. Without this, that any other letters of administration were ever granted to the said Susanna Dorothy Polgreen; and without this, that any such judgment as the plaintiff in his declaration has alleged, was rightfully rendered; all which he is ready to verify. Whereupon he prays judgment if the said David Brodie, administrator, &c., ought to have, and maintain his aforesaid action.”

To the first, third, and fourth pleas, the plaintiff demurred. To the second, he replied, “that the said Adam Hubley, administrator, &c., has not paid the debt or sum of money, in the declaration mentioned, either to Samuel Francis Lightfoot, during his lifetime, or to the said David Brodie, administrator, &c., since the death of the said Samuel Francis Lightfoot, but the same remains unpaid and due.”

The defendant joined in the plaintiff's demurrers, and demurred to his replication to the second plea.

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After argument by *Atherton* and *Tilghman*, for the plaintiff, and by *T. Sergeant* and *J. Sergeant*, for the defendant,

The opinion of the court was delivered by

GIBSON, C. J.—The question raised by the demurrers is, whether debt lies against an administrator here on a judgment against a foreign administrator of the same intestate. Did an administrator represent the person of the intestate without qualification or restriction, the plaintiff's argument would be incontrovertible. But it is clear, that his commission extends only to assets of which the ordinary had jurisdiction; and it constitutes him a representative of the intestate no further than as regards the administration of those particular assets. His power is but co-extensive with that of him from whom it is derived; and it is, consequently, incompetent, directly or indirectly, to affect assets which belong to another jurisdiction. This principle is plainly discernible in the few decisions that bear upon the point. As was held in *Dowdale's Case*, 6 Rep. 42, an administrator may be sued in a foreign country; because, the action being transitory, follows his person, and the jury may inquire of assets in his hands at home or abroad. But the judgment would not affect any assets, the administration of which had not been committed to him; as in *Borden v. Borden*, 5 Mass. Rep. 67, where a judgment in Massachusetts against one who had obtained administration in Rhode Island, was held insufficient to warrant execution *of the intestate's land. [*437] In perfect accordance with this, is *The Select Men of Boston v. Boylston*, 2 Mass. 384, and *Dawes v. Boylston*, 9 Mass. 337, in which it was determined, that an administrator, under letters taken out in Massachusetts, could not be cited to account for assets received as administrator *cum testamento annexo*, in England. Thus we see that an administration under foreign authority, has no connection with an administration granted here; and according to the maxim by which concurrent rights are to be viewed, as if they existed separately in different persons, a judgment against a foreign administrator could not be the foundation of an action against the same person to affect assets in his hands by virtue of an administration here, inasmuch as the privity to support it must be official, and not personal. If, however, he were administrator here at the time of the judgment abroad, it might be otherwise, as the jury might inquire of the assets in his hands there as well as at home. The privity between an administrator *de bonis non*, and his predecessor, which has been pressed as analogous, is entirely different, the former being the official successor of the latter, while in the

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case of separate administrations of different parts of the same estate, the authority of each administrator is respectively paramount to that of the other. But the case of an executor *de son tort*, who represents the person of the decedent only so far as regards the assets with which he has intermeddled, is, as far as it goes, entirely analogous; and in *Nass v. Vanswearingen*, 7 Serg. & Rawle, 192, it was determined, that a judgment against him is insufficient to authorize execution of the decedent's land. The authority of an administrator, under letters granted in a sister state, to meddle with the assets here, is an anomaly, produced by an unexampled spirit of comity in the courts of this state, which will probably be attended, in this respect, with perplexity and confusion.

In theory, therefore, there are insuperable objections to the action; and as regards convenience and justice, how stands it in practice? A confession of judgment is an admission of assets which creates no liability to the other creditors, or the persons entitled to distribution; and personal liability, even to the plaintiff, may be obviated by restraining the judgment to assets *quando acciderint*. What then is to prevent collusion? On the principle of the argument, even naked admissions of the foreign administrator would be competent to charge the assets here. To guard against this the law necessarily limits the power of an administrator to assets, for the due administration of which he and his sureties are responsible. Of the reason and policy of this, the case at bar, in which the foreign judgment is marked to the use of the administratrix who suffered it, is a forcible illustration. It is of little moment, that such a judgment is not conclusive, and that if there be fraud in fact, the administrator here may show it. It is sufficient that the doctrine would shift the burden of proof in the first instance, and send the [*438] defendant abroad, under every possible disadvantage, to investigate transactions, the secret springs of which must necessarily be hidden from him. In every view, then, the defendant's demurrer must be sustained, and the plaintiff's demurrers overruled.

HUSTON, J., and TOD, J., were absent in consequence of indisposition.

Judgment for the defendant.

Cited by Counsel, 6 Wright, 469.

Cited by the Court, 3 Penn. R. 189 and approved 5 R. 265.

In 6 N. 142, this case is discussed, and it is said that the case in 3 Penn. R. 189 qualified it, and that the later case received legislative sanction from the Act March 15, 1832, which declared that letters testamentary granted in other states shall give no authority within this commonwealth. Act June 16, 1836, §. 3, made an exception as to transferring stock; and Act May 15, 1850, extended the exception to loans by incorporated companies.

[PHILADELPHIA, MARCH 27, 1830.]

The President, Managers, and Company of the Schuylkill Navigation Company *against* Kittera.

IN ERROR.

The appeal given by the eleventh section of the act of the 8th of March, 1815, incorporating the Schuylkill Navigation Company, from the report of appraisers, or a jury, assessing damages, is analogous to an appeal from the award of arbitrators, and is to be governed and regulated in the same manner. Consequently, if the company appeals, and obtains a reduction of the amount of the report the complainant is not entitled to recover costs accruing since the appeal.

But when the appeal is tried by a jury of an adjoining county, not bordering on the river Schuylkill, under the provisions of the supplemental act of the 1st of February, 1821, and the company succeeds in reducing the amount of damages reported by the first jury, they are bound to pay the costs of the jury brought from the adjoining county.

ON a writ of error to the Court of Common Pleas of *Montgomery* county, the record presented the following case:—

The defendant in error, Thomas Kittera, Esq., instituted proceedings under the provisions of the act of assembly of the 8th of March, 1815, against the President, Managers, and Company of the Schuylkill Navigation Company, in which he complained of having been injured by a dam, erected and raised by them at Flat Rock, in the river Schuylkill, by means of which, the water of that river was swelled into the tail race of his mill, and water-works at the mouth of Mill-Creek, in the county of Montgomery, and his lands inundated. A jury having been summoned upon a *venire*, directed to the sheriff of Montgomery county, in order to ascertain and report to the Court of Common Pleas, what damages, if any, had been sustained by the complainant, by reason of the alleged injury, they reported the damages to be twelve hundred dollars. The company thereupon appealed to the court, under the proviso of the eleventh section of the act of assembly, and declared on oath, according to the first section of the supplement thereto, passed the 1st of February, 1821, that they apprehended *injustice [*439] might be done by a jury to be summoned from the county of Montgomery, where the premises were situated. The court then awarded a *venire* to the sheriff of Bucks county, requiring him to summon twelve persons residing therein, (who had been selected agreeably to the directions of the said supplementary act,) to go upon the premises where the injury was alleged to have been done, and having viewed the same, to appear at the next Court of Common Pleas of the county of Montgomery,

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for the trial of the appeal. In obedience to this writ, the sheriff of Bucks county returned a jury, who had viewed the premises, and who, on the trial before the court, found a verdict for the complainant for eight hundred dollars, for which the court rendered judgment. The company paid this sum to the complainant, but refused to discharge the daily pay and mileage of this jury, the complainant's bill, and the other costs, (except its own,) which had accrued since the appeal. The Court of Common Pleas decided, "that the plaintiff having succeeded in obtaining a verdict in his favour for eight hundred dollars, was entitled to costs, and that the defendants had been unsuccessful in defeating the plaintiff's recovery—although they had diminished the amount found by the sheriff's inquest from twelve hundred dollars to eight hundred dollars, and the defendants were, therefore, the unsuccessful party, within the meaning of the act, who were bound to reimburse the county for the daily pay and mileage of the jury.

The errors assigned by the company were:—

"1. That the court erred in entering judgment against the defendants below for costs, the said defendants having been the successful party on the appeal entered by them, and not liable to any costs subsequent to such appeal.

"2. In refusing to enter judgment against the defendants below without costs, and to set aside the writ of *feri facias*, which issued against them for the costs subsequent to the appeal.

"3. In deciding, that the defendants, although they have diminished the amount found by the sheriff's jury from twelve hundred to eight hundred dollars, are the unsuccessful party, within the meaning of the act, who are bound to reimburse the county the daily pay and mileage of the jury.

"4. In overruling the exceptions taken by the defendants to the bill of costs, as taxed by the prothonotary."

Tilghman and *Binney*, for the plaintiffs in error.—Three questions are raised by this record:

1. Is the complainant below entitled to costs which accrued subsequent to the appeal?

2. Are the defendants below, under the circumstances of the case, and the provisions of the law, bound to pay the expenses of the Bucks county jury, who tried the appeal.

[*440] *3. Can the execution, which has been issued by the complainant below and levied, be supported?

1st. Costs are creatures of statutes, and consequently, the complainant below must show some statute, giving him a right to those which he claims. This was a statutory proceeding al-

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together, in which peculiar advantages are secured to the complainant, particularly in the precedence given to it of all other causes on the trial list. His claim to costs, therefore, arises upon the act of assembly, or not at all. If the act had merely given an appeal, without more, the company clearly would not have been answerable for costs; for it is a general principle, that where an appeal is given, and the appellant succeeds, the appellee is not entitled to costs. The finding of the first jury was a judgment, upon which an execution might have issued if no appeal had been taken: That judgment having been reversed on appeal, upon the common law rule, each party must pay his own costs. But the act of assembly of the 8th of March, 1815, incorporating this company, refers to a standard by which appeals are to be governed. The eleventh section, which prescribes the mode in which damages shall be assessed, gives to either party an appeal, "in the same manner as appeals are allowed in other cases." The language of this part of the section is not clear; it must, therefore, be referred for its interpretation to the context, and if that will not supply the true meaning, to the general current of legislation on similar subjects. It has long been a favourite measure of our legislature, to appoint in the first instance, a subordinate tribunal; taking care, however, to secure a trial by jury, if it should be desired; and they have gone on the principle, of giving to the award of the primary tribunal the effect of a judgment. Two modes of correcting the errors of the first tribunal have been adopted; first, by giving an appeal on certain terms to the dissatisfied party; and secondly, by the imposition of costs on the party who has improperly recovered more than he is entitled to. Though the appellant is made to pay the costs up to the time of appealing, on the presumption, that the award is right; yet, if he succeeds in showing, that the award was in part wrong, he is not subject to the expenses of litigation consequent upon the appeal. This is a uniform principle. The whole theory of costs is, that they are an amercement of the party who is found to be in the wrong. From the whole language of the act of assembly of 1815, it is apparent, that the legislature had in view appeals from the award of arbitrators, and intended, that appeals under that act should be governed by the same rules. They bear no resemblance to appeals from the Orphans' Court, or from the Court of Common Pleas, in cases of divorce. They are very analogous to appeals from the decisions of justices of the peace, but much more so to appeals under the arbitration law. This interpretation has been given to the act of 1815, by this court, in deciding, that under the act of

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[*441] the 22d of March, 1817, the Schuylkill Navigation *Company were bound to give security on entering an appeal. The Schuylkill Navigation Company v. Thomas, 13 Serg. & Rawle, 431. There is no analogy to an appeal of any other kind. Where an appeal is given in the same manner as in other cases, if the manner of an appeal, under the arbitration law, was in the view of the legislature at all, that manner must hold throughout. If, by analogy to that law, an affidavit must be made, and security given, as undoubtedly they must, these steps must regulate all subsequent proceedings. The costs must follow the same guide. No other law is at all in accordance with the case, except the arbitration law, and that fits it exactly. If the legislature have omitted to complete the system, it is not legislation in this court to do so. It never could have been intended, that the company should pay the opposite party costs for attending, while he is shown to be in the wrong. This would contradict the whole theory of costs. No case can be found, in which the successful pays costs to the unsuccessful party. Upon the opposite principle, if the appellant, succeeds in reducing the damages from twenty thousand dollars to one cent, he would be compelled to pay costs to his adversary. As to appeals from decisions of the Orphans' Court, there is no principle on which the appellant, who obtains an abatement, can be compelled to pay costs. In the Orphans' Court, as in equity, costs are matter of discretion and conscience.

On an appeal under the act of assembly of 1815, incorporating the plaintiffs in error, what has been previously done, is not a nullity. If the appeal should be abandoned, clearly the first verdict would stand. The act does not say, the proceedings shall be *de novo*, but makes the first finding a judgment, which is inconsistent with the idea of the proceedings being *de novo*. The statute of Gloucester is not applicable to appeals, but to original suits. The legislature of Pennsylvania have adopted a system of their own as to costs on appeals from primary tribunals. Landis v. Shaeffer, 4 Serg. & Rawle, 196; Lewis v. England, 4 Binn. 5; Kimble v. Saunders, 10 Serg. & Rawle, 193; Downs v. Lewis, 13 Serg. & Rawle, 198; Grace v. Altemus, 15 Serg. & Rawle, 133; Flick v. Boucher, 16 Serg. & Rawle, 373; Lamb v. Clark, 17 Serg. & Rawle, 366; Gonzalus v. Liggitt, 1 Rawle, 426; Pratt v. Naglee, 6 Serg. & Rawle, 299; Alexander v. Holdship, 13 Serg. & Rawle, 230.

2. The plaintiffs in error are not bound to pay the costs of the Bucks county jury. The act of the 1st of February, 1821, which changes the *venire*, gives peculiar advantages to the complainant, and points out a peculiar mode of proceeding, which

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must be strictly pursued. The sheriff of an adjoining county, not bordering on the river Schuylkill, is to make out a list of thirty-six disinterested inhabitants of his bailiwick, from which the parties are to strike, until the number be reduced to twelve, who are to be summoned by *the sheriff, and to [*442] view the premises, and who are to receive one dollar and fifty cents per day for their attendance, both on the view and at court on the trial of the appeal, and ten cents per mile in going and returning, which daily pay and mileage are to be paid out of the county treasury, which is to be reimbursed by the unsuccessful party. The question then is, what is meant by the terms, the unsuccessful party? We say, clearly, the party who is unsuccessful on the appeal. That the company was successful on the appeal, cannot be denied, for they abated the damages found by the first verdict, one-third. If the whole of the first section be taken together, it will be found, that with the exception of the first clause as to notice, it relates exclusively to the trial of the appeal. The appeal alone is spoken of throughout; final success is nowhere mentioned. The jury are summoned to try the appeal; they are called into existence for that purpose alone. It was the only subject before the legislature when the law was proposed; and consequently, when the terms, unsuccessful party, were used, they could only have been used in reference to the subject-matter of the law under consideration.

3. The execution cannot be supported. If it can, the money to be made by it will go into the pocket of the complainant, and not into the county treasury, as provided for by the act of assembly. The county might bring a suit against the company for these costs, and payment to the complainant would be no answer to it.

J. Randall, for the defendant in error.—It is a mistake to suppose, that the complainant enjoys peculiar privileges under the act incorporating the Schuylkill Navigation Company, and its supplements. On the contrary, the advantages are all on the side of the company. The act was passed under a strong feeling in favour of internal improvement, and was considered by many as a great grievance. The right to change the *venue*, is confined to the company, a privilege of an extraordinary character, which it is difficult to account for, except from the precipitancy with which, as appears from the journals, the law was passed. As to the advantage arising from a speedy trial being given to the complainant, the constitution declares, that no man's property shall be taken for public use without compen-

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sation, and in general, the compensation is given before the property is taken.

1. The act of incorporation says nothing about costs, but gives to either party an appeal in the same manner as in other cases. Admitting that the arbitration law furnishes the standard, as to the manner of the appeal, it does not follow, that it is to be governed by that law in all its consequences. It is said, this case is to be governed by the principle of an appeal from an award. In Troubat and Haly's Practice, there are six kinds of awards mentioned, from which an appeal lies—which is to be followed here? There are also two kinds of appeals from the judgment [*443] of a justice: one, where the *justice gives judgment himself; the other, where he enters judgment on an award of referees. There is also an appeal from the decrees of the Orphans' Court, and from the Court of Common Pleas in cases of divorce, and many other varieties of appeals, governed by different principles, to any of which the language of the act of 1815, would apply with as much propriety, as to appeals under the act regulating arbitrations. It is owing to the express provisions of the arbitration law, that costs cannot be recovered where the appellant succeeds in reducing the amount; but the act of 1815, contains no such provisions. At common law, the party who finally succeeds, no matter how little, is entitled to costs. On appeals from justices, the exemption from costs on succeeding in the appeal, depends upon whether or not new evidence has been produced. Perhaps in this case, new evidence was given. The whole of the opposite argument has gone upon the supposed analogy between an appeal under the act of 1815, and one from the judgment of a justice, on the award of arbitrators, but as both these are the subjects of express and particular legislation, the analogy does not hold. The loss of costs by obtaining an abatement, is always the effect of statutory enactment. If, on appeal from a decree of the Orphans' Court, this court sets aside the decree in part, the costs follow the partial decree, unless it be otherwise ordered. *Guier v. Kelly*, 2 Binn. 294. Here there was no reversal of the judgment, which is the basis of the argument on the other side; but the moment the appeal was taken, the former finding became a nullity, and the proceedings were *de novo*. There was no reversal, for there was nothing to reverse; no abatement, for there was nothing to abate. It is said, that at common law there are no costs, and the complainant must show some statute to entitle him to them. If the common law, before the statute of Gloucester be meant, the position is true; but that statute gave costs in all cases in which damages were recovered. It

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lies, therefore, upon the opposite party to take the case out of the general rule, which has not been done; for it is altogether a gratuitous assumption, that the arbitration law was the standard which the legislature had in view. 1 Troubat & Haly's Practice, 221; 2 Id. 528, 529.

2. At all events, the company must pay the costs of the foreign jury. They alone have the power to avoid the prejudices of the country by changing the *venire*. It is not, then, a sound construction of the act, that unless they are entirely successful, they shall pay the costs of the tribunal to which they exclusively have the privilege of resorting? The verdict of the foreign jury is not the result of the appeal, but of the suit; or rather, of taking the complainant's property by the company. Who, then, is the unsuccessful party? He who does not ultimately succeed in the controversy. Nothing is said in the act, of want of success in the appeal, but want of success generally. Upon the reversal of a judgment in this court, *each [*444] party generally pays his own costs; but that is, where the judgment is entirely reversed. But adopting this as the governing principle, whose costs are they? Certainly the costs of the company, incurred by their own act, in the exercise of their exclusive privilege, and for their own benefit.

To the third point, the court told Mr. Randall it was unnecessary to speak.

SMITH, J., (after stating the case,) delivered the opinion of the court as follows:—

By the eleventh section of the act of assembly of the 8th of March, 1815, it is provided, "That either party may appeal to the court within thirty days after such report may have been filed in the prothonotary's office of the proper county, in the same manner as appeals are allowed in other cases." The language of this clause—the oath, that the party appealing apprehends injustice may be done, the filing of the report, and a certificate of the oath with the prothonotary, the practice of entering into a recognisance, according to the directions of the arbitration act, and the trial by a jury afterwards, all indicate, that the appeal given by this act, is to be considered as analogous to the appeal from the award of arbitrators, and is to be governed and regulated in the same manner. How then are costs, accruing on such appeals, to be paid? It has been repeatedly decided, and since the case of *Landis v. Shaeffer*, has been the practice and law in every Court of Common Pleas in this state, that if the defendant appeals and obtains a reduction of the amount of the award, the plaintiff is not entitled to recover

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costs accruing in consequence of the appeal. 4 Serg. & Rawle, 196. The Court of Common Pleas, therefore, erred, when they allowed the complainant the amount of his bill, fifty-nine dollars and ninety-eight cents, or his costs since the appeal.

Another error assigned is, in the decision of the court, declaring, that the company was the unsuccessful party within the meaning of the act of assembly, although it had diminished the amount found by the first jury from twelve hundred dollars to eight hundred dollars. By the act of the 1st of February, 1821, the daily pay and mileage of the jurors, brought together in consequence of the appeal, are directed to be paid out of the treasury of the county in which the trial may be, and the same shall be reimbursed to the county by the unsuccessful party. It is to be remarked, that this act confers a very important privilege exclusively upon the company—the privilege, on appeal, of changing the *venue* to an adjoining county, not bordering on the river Schuylkill. The question then is, what is meant by “the unsuccessful party.” Is it the unsuccessful party in the appeal, or the unsuccessful party in the whole proceeding, or suit? Had the legislature intended to confine this designation [*445] to a part of the entire proceeding, we are warranted *in believing, that their language would have been explicit to that effect: they would have said, that the daily pay and mileage of the jurors should be reimbursed to the county by “the unsuccessful party” in the appeal. We cannot restrain this general expression, applicable to a party to the suit, where it might have been so easily limited without violating what we believe to have been the equitable intention of the legislature, since we doubt not, that they meant, that the party who, in the event of the suit, was found to have been in fault, should reimburse the county for these expenses; and that meaning, the terms which they have employed, aptly convey. One jury had declared, the injury done by the company’s works to the complainant to be twelve hundred dollars; another jury, summoned on the application of the company, declared it to be eight hundred dollars; so that both said there was a just cause of complaint, and disagreed only as to the amount of compensation. But as to the injury done, the complainant succeeded in establishing it before both tribunals, and was, therefore, in fact, the successful party. The company is, in our opinion, the unsuccessful party, within the meaning of the act of assembly, and is to reimburse to the county the daily pay and mileage of the jury. And we think, that the judgment, as to the daily pay and mileage of the jury, should be affirmed, but reversed as to the complainant’s bill of costs.

Cited by Counsel, 8 W. & S. 461.

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Case of the Plan of the Third Division of the District of Kensington.

CERTIORARI.

The eighteenth section of the act of assembly, incorporating the Kensington District of the Northern Liberties, which authorizes the commissioners to appoint one or more surveyors, who are required to survey and mark the lines of all the streets, &c., then open, and to lay out such other new streets, lanes, and alleys, &c., as they may deem necessary and convenient for a regular town plan; and gave them power, for these and other purposes, to enter upon the lands of any person or persons within the district, extends to all property within the incorporated limits, whether held by individuals or corporations; and consequently, that part of the Germantown and Perkiomen Turnpike Road, which is within the district, came within the scope of the authority vested in the commissioners.

CERTIORARI to the Court of Quarter Sessions of *Philadelphia* county.

The president, managers, and company, of the Germantown and Perkiomen Turnpike Road, removed to this court the order of the *Court of Quarter Sessions of the county of [*446] Philadelphia, dismissing the exception filed by them to the plan of the Third Division of the District of Kensington, together with the proceedings thereon.

The following error was assigned in the proceedings of the court below :—

“By an act, passed the 12th of February, 1801, entitled, ‘An act to enable the governor to incorporate a company to make an artificial road from the city of Philadelphia through Germantown to the ten mile stone on Chestnut Hill, and from thence to the new stone bridge over Perkiomen Creek, in the county of Montgomery,’ the courses and distances of the said road are prescribed, and the said President, Managers, and Company, are authorized and required to cause the said road to be laid out not less than fifty, nor more than sixty feet, and the level in no place to rise or fall more than four degrees; and are required to keep the said road in good and perfect repair, and generally, the control, direction, and right of the said road, are vested in the said President, Managers, and Company; and the mode of divesting their said right is specifically enacted and declared; notwithstanding which, by the said plan, the width of the said road is lessened by requiring footways to be laid out of the width of thirteen feet from each side of the said road, reducing the said width from sixty to thirty-four feet, and less.

“And the level and surface of the said road are required by

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the said plan, to be changed from the levels and surface originally established, according to law; first, by raising the sides of the said road or footways, in parts five feet and more above the present legal surface, and in parts of less and different height; and, secondly, by requiring the bed and surface of the said road to be raised and changed from the level and surface, so as aforesaid established and long continued, according to law.

“And the said President, Managers, and Company, did, therefore, except to the said plan; but the said Court of Quarter Sessions ordered their said exception to be dismissed, in which they allege manifest error in law.”

Chew and J. R. Ingersoll, in support of the exception.—The question is, whether or not the act of incorporation of the Kensington District of the Northern Liberties, gives to the commissioners a right to alter the levels, &c., narrow the limits of the Germantown Turnpike Road; and thus, and in other respects, interfere with the vested rights of a pre-existing corporation. The impolicy and injustice of such an interference forbid the idea, that the legislature intended to give to the commissioners the powers to encroach upon a road made under a charter of so old a date, and upon which such large sums of money have been expended. The Germantown and Perkiomen Turnpike Road Company was incorporated by an act of assembly, passed the 12th of February, 1801, which prescribes the width and the [*447] levels of the road, requires the company to make *ditches and drains, and to keep the road in good order. The effect of the establishment of this “plan,” will be to destroy many of the essential provisions of this act. It will, by raising footways on each side, not only narrow the road from fifty to thirty-four feet, and take sixteen feet away from the jurisdiction of the company, but convert the road into a water course. The duties imposed upon the company are enforced by heavy penalties; and the consequence of applying the “plan” to the road, will be to expose the company to severe penalties for the non-performance of duties which it has become impossible for them to perform. The legislature never could have contemplated the extension of the proposed plan to a turnpike road previously made under an act of incorporation. If they did, it was a violation of the constitution, because, it impaired the previous contract, made by the legislature with the company.

A part of this road passed through the Northern Liberties, and an application was made by all parties to the legislature, who, by an act, passed the 27th of March, 1824, authorized a cession of a part of the road by the company to the district. The cases are precisely similar, and if, in the one, it was neces-

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sary to make a special application to the legislature, it is not easy to understand how, in the other, the commissioners were authorized to take away part of the road without such an application.

The court declined hearing *Dallas* and *Goodman* against the exception.

The opinion of the court was delivered by

ROGERS, J.—In the eighteenth section of the act to incorporate the Kensington District of the Northern Liberties, the commissioners are authorized to appoint one or more surveyors, who are required not only to survey and mark the lines of all streets, &c., then open, but also to survey and lay out such other new streets, lanes, and alleys, &c., as they might deem necessary for a regular and convenient town plan; and for these and other purposes, they were vested with full power and authority to enter upon the lands of any person within the district. The intention of the legislature was, to give all the authority necessary to the commissioners, to lay out the town in the manner most convenient and useful to the inhabitants of the district; and in furtherance of this object, so highly beneficial to the citizens, they have vested in the surveyors full and plenary authority, liable to be reviewed and corrected in the manner therein prescribed. The words of the act are sufficiently comprehensive to embrace all property within the incorporated limits, held either by individuals or corporations; and it would, I conceive, be against the spirit of the section, to exempt any property, whether real, or partaking of that character, within the district, from their control, as this would materially interfere with the intention of having their town regulated on a uniform, convenient, and regular plan. As, then, the property of the company would seem to be embraced by *the words and spirit of the act, it is [*448] incumbent on them to show something peculiar in their case, from which to claim the benefit of an exemption from the general scope of the authority vested in the commissioners.

The President, Managers, and Company of the Germantown and Perkiomen Turnpike Road say, that they are not intended to be affected; because, it would interfere with a vested right, (which is not to be supposed without express words,) and they hinted, although the point was not much pressed, that it would impair the obligation of a contract, to take their property for public use. To this, it may be answered, the right of individual property is a vested right, as much so in the case of an individual, as a corporation, and that the appropriation of it to public use would be as much a violation of a contract in one case as the other. Although the company is bound, as has been stated,

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under severe penalties, to keep the road in repair, yet if, as has been contended, this will be rendered impossible by the confirmation of the plan reported by the surveyors, that fact would, of itself, furnish a valid defence to a suit for the penalty. A non-compliance with the provisions of the act would be excused, by showing a subsequent appropriation of the property to public use. It is a fundamental principle of all government, that the rights of individuals must yield to the general welfare, and the only security of the citizen, (and in most cases it is an ample one,) consists in the constitutional provision: "That no man's property shall be taken or applied to public use, without the consent of his representatives, and without a just compensation being made." And in conformity to this article of the constitution, the legislature have guarded the interests of all concerned, by declaring, "That no street, road, lane, court, or alley, shall be opened and appropriated to public use, until the owner of the ground shall be compensated for the damages he may have sustained." They have also directed the manner in which the compensation shall be ascertained and paid, by a proceeding under the act of the third of April, 1804. Here there is a legislative remedy provided; for although the term owner or owners of the land, be used, and the company are not strictly the owners of the soil, but an easement merely; yet, we consider these words sufficiently broad to cover the case. For the purpose of affording an adequate remedy to the party aggrieved, we are inclined to give this part of the section a liberal construction, as has been done in *Reese v. Addams*, 16 Serg. & Rawle, 40, which, although not precisely this case, resembles it in some of its features. The only difficulty which can arise is in respect to the form of proceeding, while even that, may be instituted in the corporate name, and we, the more readily come to this conclusion, to avoid the multiplicity of suits which would be the consequence of suing in the name of the owners of the land, for the use of the company. We think it right to give the act such a construction as to secure to the inhabitants of the district the object they had in view, and at the same time, to guard the rights of the [*449] company from violation, and secure to them such compensation as they may be justly entitled to under all the circumstances. If, as has been suggested, the property of the company has been taken in contradiction to the directions of the act, it is such an injury as may be compensated in damages in the usual manner.

Proceedings affirmed.

Cited by Counsel, 3 Wh. 508; 8 W. & S. 461; 10 N. 218.

[PHILADELPHIA, MARCH 27, 1830.]

Stahl against Jarrett.

IN ERROR.

In an action for money had and received, to recover money received by the defendant from the sheriff, arising from the sale of the lands of a person against whom both the plaintiff and defendant had judgments, it is competent for the plaintiff to show by parol evidence, that the defendant's judgment, which was the oldest, had been satisfied before the money came into the sheriff's hands: That it was kept on foot by covin and fraud, and that he, (the plaintiff,) was not a party to a rule entered in the suit in which the defendant's judgment was obtained, to show cause why that judgment should not be postponed; nor to the following entry on the record, made the next day: "Settled by compromise between the parties."

THE record of this case having been returned on a writ of error to the Court of Common Pleas of *Lehigh* county, accompanied by four bills of exceptions to the rejection of evidence, it appeared, that the plaintiff in error, John Stahl, brought an action in the court below against John Jarrett, the defendant in error, for money had and received, by the latter to the use of the former. The money, amounting to five hundred dollars, was received by Jarrett in the year 1819, from Anthony Musick, former sheriff of *Lehigh* county, out of the proceeds of the sale of the real estate of a certain John Hanger, by virtue of an alleged judgment in his favour against the said John Hanger and one John Witzell, Jr., entered in the Court of Common Pleas of *Lehigh* county on the 20th of November, 1815, for eight hundred dollars. Upon this judgment no execution had issued.

The plaintiff, Stahl, had a judgment for one thousand dollars, entered in the same court against the said John Hanger, on the 21st of July, 1818, upon which executions issued, and the land of Hanger was sold. He claimed the proceeds of the sale, alleging, that Jarrett's judgment had been paid, or satisfied by the defendants in that judgment, or one of them, before the money was received by the sheriff; or, that for other reasons, the defendant's judgment was not a valid, subsisting judgment.

After having proved the receipt of the money by the defendant *from the sheriff in the year 1819, the plaintiff called, as a witness, Thomas Amey, and proposed to prove by [*450] him, a conversation, alleged to have taken place in his presence, between John Jarrett and Jacob Witzell, touching the bond on which the judgment of Jarrett against Hanger and Witzell was obtained, in which Jarrett acknowledged, that he had delivered up the said bond to Hanger, and purchased it again from

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Hanger at a subsequent period. To this evidence the defendant's counsel objected, on the ground that the record of the suit, *Jarrett v. Hanger and Witzell*, contained the following entries:—

“February 2d, 1819.—Rule to show cause why the above judgment should not be postponed,” &c.

“February 3d, 1819.—Settled by compromise between the parties.”

The court sustained the objection, and at the request of the plaintiff's counsel, sealed a bill of exceptions.

The plaintiff then called as a witness, Jacob Hartzell, and offered to prove by him, who were the parties to the settlement entered of record, as mentioned above, other than those persons whose names appear of record, as parties to the suit. This testimony was also objected to by the defendant's counsel, and rejected by the court, to whose opinion, the counsel for the plaintiff took a second exception.

The subject of the third bill of exceptions, was an offer by the plaintiff to prove, by Jacob Hartzell, that John Stahl, (the present plaintiff,) was not a party, or privy to the settlement of record, in the said suit, which evidence the court rejected, on an objection to it by the counsel for the plaintiff.

The plaintiff then offered to prove by John Hanger, Jr., that prior to the year 1819, John Jarrett had delivered up to his father, the before-mentioned John Hanger, the bond on which the judgment was obtained by Jarrett against Hanger and Witzell, on the 20th of November, 1815, and that afterwards, and prior to the year 1819, Jarrett had purchased the said bond from the said John Hanger, for five dollars. This evidence being objected to by the counsel for the defendant, it was rejected by the court, upon which a fourth bill of exceptions was tendered by the plaintiff's counsel, and sealed by the court.

A verdict was given for the defendant, upon which judgment was rendered, whereupon the plaintiff sued out a writ of error.

C. Davis and Stroud, for the plaintiff in error.—Jarrett held a judgment, obtained in 1815, and Stahl one, obtained in 1818, both binding the real estate of Hanger, which in 1819, was sold under the latter judgment. The sheriff, under the idea that Jarrett's judgment is a valid and subsisting one, pays the proceeds of the sale to him. It is afterwards discovered, that this judgment is satisfied, and Stahl, who was consequently entitled to the money, which Jarrett had received from the sheriff, by [*451] collusion with Hanger, *brings this action to recover it. This is, shortly, the case the plaintiff below proposed to prove. For this purpose, he offered evidence to show, that al-

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though the judgment remained upon the record, the bond had been delivered up, as he alleged, to be cancelled; and that, therefore, the judgment was no longer a subsisting one. To the entry on the record of the suit, Jarrett v. Hanger, he contended, he was neither a party nor a privy; and offered to prove that fact by evidence. The court, however, decided, that he was a privy, and estopped from contradicting the record. The entry in question, was not the act of the court, but of the parties, and is not, properly speaking, any part of the record. But if it were the act of the court, it could not bind the plaintiff in this cause without notice, which he never received, actual or constructive. He could not have received notice, as the rule to show cause why the judgment should not be postponed, was taken on the 2d of February, and the entry of "settled by compromise between the parties," was made the next day. The evidence offered by the plaintiff, and rejected by the court below, went to show, that he was neither a party nor a privy to that transaction, and that if there was not positive fraud, there was at least *suppressio veri*, in concealing the fact, that the bond had been delivered up. If the offer had been directly made to prove fraud, it could not have been refused, even if the evidence contradicted the record. Here the evidence offered tended to prove fraud, and did not contradict the record, but explained it by matters *dehors*. The entry alluded to, did not show the judgment to be a subsisting one, for it did not indicate the parties or privies, except the parties on the record. The only persons who can be affected, are parties and privies in blood, or in estate, and it is not pretended, that the plaintiff held either character. All the cases establishing the principle, that a judgment cannot be inquired into, refer to parties. A judgment certainly binds the parties to it, and this is all that is decided. Estoppels are odious, and governed by strict principles. If the plaintiff was estopped by a compromise between the parties, it rested with the other side to show that he was a party. The court below not only did not require this to be done, but would not permit him to show who really were the parties. This was clearly error. 1 Phill. Ev. 226; Stevelie v. Read, 2 Wash. C. C. Rep. 274; Leather v. Poultney, 4 Binn. 356; Lazell v. Miller, 15 Mass. Rep. 207.

Admitting the right of the plaintiff to compel Jarrett to enter satisfaction on the judgment, under the act of the 13th of April, 1791, which is by no means clear, it would not help him to get back the money which the defendant has wrongfully received from the sheriff.

Brooke and Scott, for the defendant in error.

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1. The entry of the rule to show cause why Jarrett's judgment should not be postponed, and the subsequent entry of, "settled by compromise between the parties," justified the defendant in receiving *the money from the sheriff. It [*452] was conclusive upon all persons interested in the application of that money. The entry was matter of the record, for it formed part of the proceedings in the cause. The Berks and Dauphin Turnpike Company v. Hendel, 11 Serg. & Rawle, 123. If the entry was part of the record, it imports absolute verity, and cannot be contradicted. 3 Bl. Com. 24; 1 Inst. 260; 1 Phill. Ev. 238; Randall's Peake, 34; 1 Phill. Ev. 245; 2 Hen. & Munf. 55. The inquiry, then, is reduced to this: was Stahl a party or a privy to that proceeding? He was a party at law. It was in his suit that the money was made. The application to postpone Jarrett's judgment, was made at the next term, and every person who had a judgment binding the land, the proceeds of which were in the sheriff's hands, was a party. Who made the motion, the record does not show; but that it was for the benefit of the plaintiff, is proved by the present action, the foundation of which is, that if Jarrett's judgment had been postponed, he would have got the money. The case then stands thus:—A man forces a sale of another's property, and if he can succeed in postponing an earlier judgment, he will be paid. An application for that purpose is made to the court, and the matter is compromised. Can it be pretended, that a creditor thus situated, is not a party? Upon such an application, the parties are, the prior judgment creditors on one side, and the subsequent judgment creditors on the other. The proceeding is in the nature of a proceeding *in rem*, and is governed by the same rules. The entry on the record was, therefore, conclusive upon all who had an interest in the subject. Stahl, undoubtedly, had an interest in the entry, and the law presumes him to have been heard. Besides, having made the money by his execution, he was bound to see to the distribution of it. Strickland v. Strickland, 6 Serg. & Rawle, 102. If the plaintiff was not a party to the proceeding, he was a privy. Privies are such as are partakers, or have any interest in any action or thing, or relation to another. 1 Burns's Law Dict. 572; Wood. b. 2, c. 3; 5 Jacobs's Law Dict. 285. The plaintiff was obviously a partaker in the transaction. Standing in the relation of a judgment creditor, he was interested in the application. In every point of view, he falls within the definition of a privy. How can he allege that he had not notice, when the very subject of the controversy, the money in the sheriff's hands, was raised by his own act? It was his duty to be represented, and not the duty of the defendant to give him

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notice to come in and defend his rights. He was in court, and bound by all that passed. This case may be assimilated to that of an administration bond, where a suit is brought by one creditor in the name of the commonwealth, and the result of it is conclusive upon all. *Carl et al. v. The Commonwealth*, 9 Serg. & Rawle, 63. It resembles, too, the case of a prescriptive mode of tything, or a customary right of way. The principle in such cases is, that all who are interested are privies. There are but three classes of persons known, in reference to records: *first, parties; second, privies, both of whom are bound; [*453] and, third, strangers, who are not. It cannot be pretended, that the plaintiff, who was the prime mover in the matter, was a stranger. If there had been an express adjudication on the subject, there would have been no room for doubt. *Gratz v. The Lancaster Bank*, 17 Serg. & Rawle, 278. A compromise of record, with the approbation of the court, is equivalent to an adjudication. The question of party or privy to the record in dispute, is a question of law, to be determined by the court on an inspection of the record itself. *Croswell v. Byrnes*, 9 Johns. Rep. 287. If the court decide, that Stahl was a party or a privy, they cannot do away that decision by parol evidence, which is the result to which the proposed testimony would lead; still less can it be permitted in favour of a party who has himself given the record in evidence.

A conclusive answer to the whole of the plaintiff's case is, that the money was received under a judgment of record, and while that remains, it cannot be recovered back. Besides, the plaintiff comes too late. The defendant received the money in question in 1819, under an agreement sanctioned by the court. In 1825, this suit was brought, in which the plaintiff asks the court, at this late day, to overhaul the whole matter, merely because he did not attend to his own business at a proper time. His proper course would have been to give notice to Jarrett, to enter satisfaction on his judgment, under the act of assembly of the 13th of April, 1791.

The opinion of the court was delivered by

ROGERS, J.—The *gravamen* of the plaintiff's suit is a fraud of the defendant, for which, under the circumstances of this case, the action for money had and received is the appropriate remedy. The defendant alleges the money was received by virtue of a good, valid, and subsisting judgment; but whether the judgment is subsisting and unsatisfied is the very matter in controversy. The plaintiff alleges payment or other satisfaction, and that the judgment is kept on foot by fraud; that it is between other parties, and that he is indirectly, although not directly in-

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terested in it. This case is similar in principle to a suit brought by a creditor against an executor, who pleads *plene administravit præter*, &c., goods and chattels not sufficient to pay outstanding and unsatisfied judgments, &c., to which the plaintiff may reply, and by this means put the validity of the judgment in issue, that the judgments were obtained, and kept on foot by covin and fraud. It is manifest, that the act of the 13th of April, 1791, directing satisfaction to be entered on judgments, furnishes no remedy to the plaintiff, for taking it for granted, that he has such an interest as to entitle him to request satisfaction to be entered, (which is not altogether clear;) yet, a resort to the mode pointed out by the defendant would afford him no relief, as, on a refusal to enter satisfaction, it would merely subject the [*454] judgment creditor to a penalty to the party aggrieved, in a sum not exceeding one-half the debt or damages.

But, it is contended, the validity of the judgment is *res judicata*, and they rely on the entry, that, on the 2d of February, 1819, there was a rule to show cause why the judgment should not be postponed, and on the 3d of February, 1819, there was entered on the docket, "settled by compromise between the parties." There is nothing in this entry which shows that the plaintiff was a party to this proceeding: on the contrary, he offers to prove that he neither obtained the rule, nor was he aware of the compromise. But it is said, that if not a party, yet he might have been, and that he is equally concluded by the decree of the court. In the first place, it strikes me that this cannot, with any propriety, be considered as the act of the court, but as a controversy between other parties, and a settlement of their claims without any adjudication by the court. We are too well aware of the manner in which such entries are made, to give them the effect of a judicial decision. But, if the court had passed upon the validity of the judgment, it is clear it would bind only the parties. Had there been a decree of the court, distributing the money raised by the sheriff's sale, such an adjudication would have been conclusive, because the court would have taken care that all persons interested should have had notice; but it appears to me that the proceeding does not partake of that character. There was no rule to bring the money into court, which would be necessary to give it jurisdiction over the money made by the sheriff's sale. It was a rule obtained in that suit which affects the parties, but not a stranger, which the plaintiff alleges and offers to prove he was. If such an entry as this is to bind others who are not parties, and without any notice or opportunity of being heard, it requires but little reflection to perceive the great fraud and injustice

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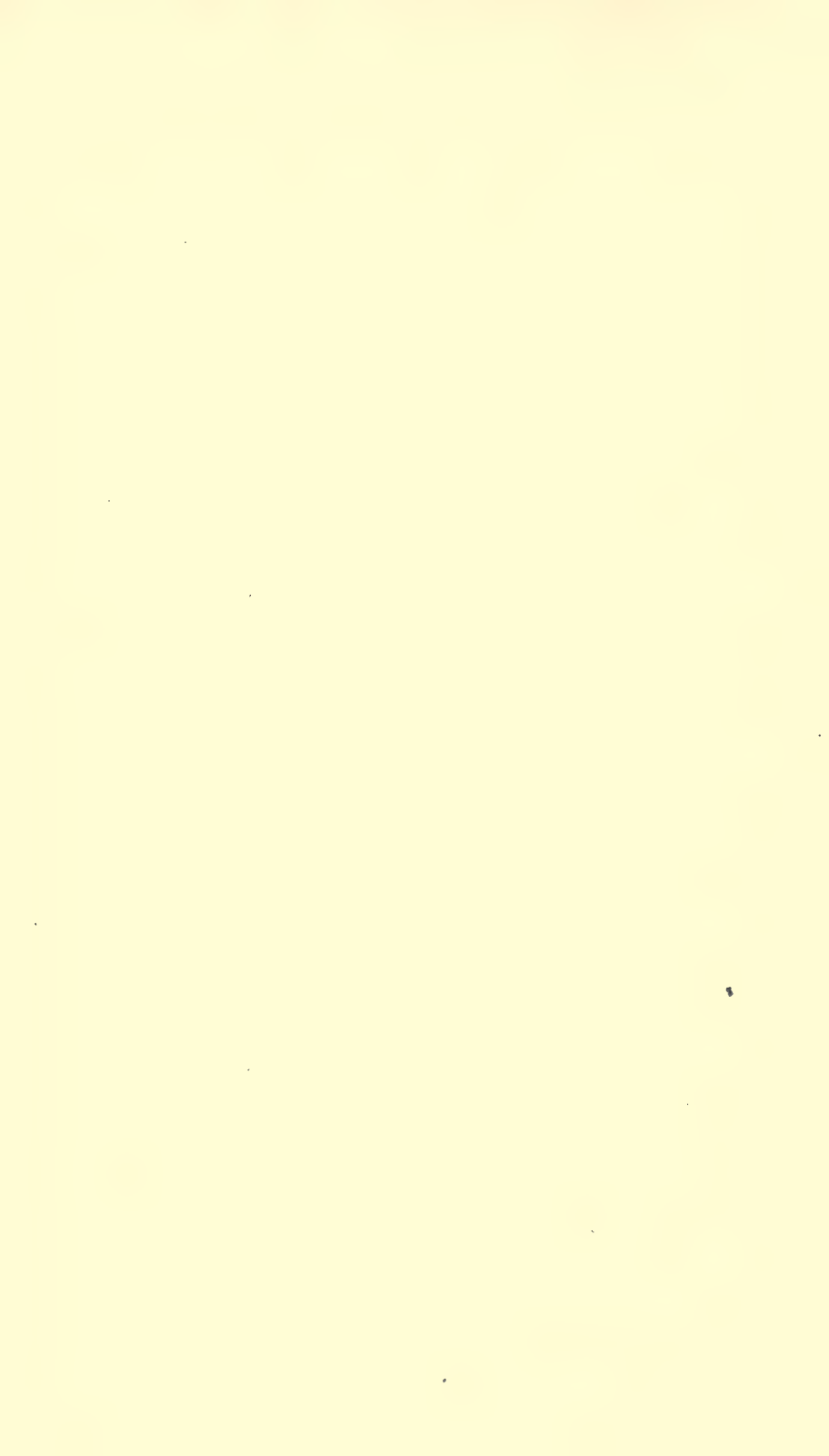
which would be the necessary consequence. We are of the opinion that the Court of Common Pleas erred in rejecting the testimony ; that the judgment should be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 9 W. 384; 8 Barr, 162.

Cited by the Court, 3 Penn. R. 203.

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1. A declaration setting forth, that the defendant bound himself not to do a particular act, when it is manifest that he intended to bind himself to do that act, being amendable in the court below, will be considered by this court as actually amended. *Cummings v. Lebo*, 23
2. It is not error to permit a *scire facias*, to revive a judgment to be amended, even after the plea of *nul tiel record* pleaded. *Willard v. Norris*, . . 56
3. In no case can a continuance be demanded by reason of an amendment, unless where the opposite party is thereby taken by surprise, and of that matter, generally, the court must judge. *Folker and another, Administrators of Huggins, v. Satterlee*, 213
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2. If an appeal from an award of arbitrators be made without the affidavit required by law, the irregularity is waived by the opposite party taking the costs out of court. *Beidman and others v. Vanderslice and others*, . 334
3. The appeal given by the eleventh section of the act of the 8th of March, 1815, incorporating the Schuylkill Navigation Company, from the report of appraisers, or a jury, assessing damages, is analogous to an appeal from the award of arbitrators, and is to be governed and regulated in the same manner. Consequently, if the company appeals, and obtains a reduction of the amount of the report, the complainant is not entitled to recover costs accruing since the appeal. *The Schuylkill Navigation Company v. Kittera*, 438
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2. Where a bond is directed by statute, to be taken by a corporate body, but no form is prescribed, it is good, though taken in the name of individual members, as obligees, . *Ibid*.
3. A joint bond cannot, as against a surety, be shown to have been made

so by mistake, instead of a joint and several bond, by evidence *dehors*, unless the evidence leave no doubt, that a mistake, in point of fact, has been committed, and the instructions of the parties departed from. *Moser v. Libenguth and another, Administrators of Libenguth*, 428

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2. A common recovery, whether it is valid or void, works a forfeiture of the particular estate. Where A. had an estate for life, and the issue of A., as tenants in common, had contingent, concurrent estates in remainder, and a recovery was suffered by A. of the whole estate: Held, that, although the recovery was void, for want of a good tenant to the *præcipe*, the estate of A. was forfeited by the recovery, and the contingent remainders of his issue were consequently destroyed, . . . *Ibid.*

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CONSTABLE.

1. A constable is not liable to the plaintiff for not serving an execution issued by a justice, where the justice has gone to the constable and withdrawn it, in consequence of a *certiorari* delivered to him, though no bail was entered on taking out the *certiorari*. *Sherfy v. Fisher*, . . . 147
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2. But such contribution is a personal charge against the co-tenant, and not a lien on the profits in the hands of his successor, *Ibid.*

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1. In Pennsylvania, an executor plaintiff, is bound to pay costs to the defendant in case of non-suit, or verdict for the defendant, as well where he necessarily sues in his representative character, as where the cause of action arises after the death of the testator. *Muntorf and another v. Muntorf*, 180
2. But costs accrued since the testator's death, are not a lien on his lands as against the purchaser, *Ibid*.
3. Where an act of assembly gives treble costs to the defendant, the English rule on this subject does not prevail, but the defendant is allowed three times the usual costs, with this restriction, that the fees of the officers are not to be trebled, where they are not regularly and usually payable by the defendant. *Shoemaker v. Nesbit*, 201

COUNTY COMMISSIONERS.

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1. The commissioners of a county, as well as the treasurer, are bound to take an oath of office. *Keyser and others, Commissioners, &c., v. M'Kissan*, 139
2. A bond given to A., B., and C., commissioners of a county, and their successors, may be sued in the names of their successors. *Long and another v. Laufman and others, Commissioners, &c.*, 154
3. A bond given to commissioners of a county, to secure the performance of a contract for building a bridge, is valid, though not expressly directed by any act of assembly, . . . *Ibid*.
4. Query, whether the commissioners are bound by the report of the court and grand jury, in respect to the materials of which the bridge is to be built? But if they are, it is no defence to a contractor, sued on his bond, that they have deviated from such recommendation, . . . *Ibid*.
5. Nor, that such bridge was not built

on the public highway, if it was as near it as public convenience required, *Ibid*.

COUNTY RATES AND LEVIES.

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COUNTY TREASURER.

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COURT.

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COURT MARTIAL.

1. If a court-martial, *bona fide*, convicts a person not subject to militia duty, of an offence within its jurisdiction, as for non-attendance at training, neither the members, nor the officer executing their sentence, are liable in trespass. *Shoemaker v. Nesbit*, . 201
2. If they act *mala fide*, they would be liable as trespassers, *ab initio*, . *Ibid*.

COVENANT.

See RENT, 3.

1. The words "intended to be recorded," used in a deed, in reference to a power of attorney, under which the deed purports to have been made, imply a covenant on the part of the grantor to procure the power to be recorded within a reasonable time. *Penn v. Preston*, 14
2. The covenant is not fulfilled in relation to lands in Wayne county, by recording the power in Philadelphia county, unless it be proved, that the grantor also had lands in Philadelphia county, to be affected by the power, *Ibid*.

CREDITORS.

See SALE, 4, 5.

DAMAGES.

See APPEAL, 3, 4. TROVER, 2, 3.

Damages for detention, are recoverable in a suit for a penalty, by the party grieved; but it is otherwise in the case of a common informer. *Ritchie v. Shannon*, 196

DEBT.

See EXECUTORS AND ADMINISTRATORS, 1. NEW PROMISE.

DEBTS.

1. Testator directed his executors to purchase a tract of land, to be conveyed to them in trust for his son, who was to have the rents, issues, and profits thereof, but the same was not to be liable to any debts contracted, or which might be contracted by his said son, at whose death, the land was to vest in the heirs of his body; and, if he should die without heirs of his body, then to vest in the right heirs of the testator. Held, that the son had not such an interest in the land as could be taken in execution, and sold for his debts. *Fisher v. Taylor*, 33
2. The act of 4th of April, 1797, limiting the lien of debts on the real estate of a decedent to seven years, protects such estate only in the hands of a *bona fide* purchaser, and not in the hands of an executor, who has himself become the purchaser. *Bruch v. Lantz*, 392

DECEDENT.

See DEBTS, 2.

DECLARATION.

See AMENDMENT. ERROR, 3, 4, 5.

DEED.

See COVENANT, 1. PURCHASER, 1, 2.

DEPOSITION.

See PRACTICE, 6.

DEPUTY SURVEYOR.

See EVIDENCE, 8. SURVEYOR.

DESCRIPTION.

See POSSESSION, 2. PURCHASER, 1, 2.

DEVISE.

1. To effectuate the intention of the testator, "or" may be construed "and." *Stoen v. House*, 28
2. Devise to A. and B., or to their heirs. B. at the time of making the will was dead, of which the testator was ignorant. Held, that the devise to B. had lapsed, and the testator's heir at law was entitled to recover, *Ibid*.
3. Testator devises to one child a tract of land, and afterwards devises to

another child a larger tract, held by another title, and which embraces within its boundaries the whole of the tract first devised. Evidence is inadmissible on the part of the first devisee to show that the title to the larger tract was defective. *Seckle v. Engel and another*, 168

4. Under such circumstances, the two devisees take the smaller tract together as tenants in common, . *Ibid*.
5. Devise "to A. during his natural life, and, after his decease, if he shall die, leaving lawful issue, to his heirs as tenants in common, and their respective heirs and assigns for ever; but, in case he shall die without leaving lawful issue, then to B., the brother of A., to hold to him, his heirs and assigns forever." Held, that A. took an estate for life; that A.'s issue, as tenants in common, and B. took, respectively, contingent estates in remainder, but one of which remainders could ever become vested; and, that neither of these remainders could become vested, till the death of A. *Stump and others v. Findlay and others*, 168
6. Testator devised to his wife during her lifetime, or widowhood, all his estate real and personal, to be applied by her towards raising and schooling his children, and at her decease, the remainder, if any, to be divided according to the laws of this commonwealth, share and share alike; and in case she should see cause to marry, she was to have only her bedding, and an equal share with the children that might then be living out of his estate, and the remaining executor or guardians of the children, to take care of their parts. He then appointed his wife and another, executors, empowering them to sell the tract of land in dispute, and the money that might be got for it to be laid out on other property, or to the best advantage, except what might be necessary for keeping, schooling, and raising the children until they were empowered to call for it, agreeably to the former part of the will. The wife survived the other executor, and married. Held, 1. That she and her husband had no power to sell. 2. That after the children had arrived at full age, the power, even if the other executor had been living, ceased. *Clark v. Campbell*, . . . 215

DISTRESS.

RENT, 1, 2, 3.

On a demise of a grist mill, the lessee to render one-third of the toll, the lessor may distrain for the rent. *Fry v. Jones*, 11

EJECTMENT.

See AGREEMENT.

ELECTION.

1. Under the act of assembly of the 24th of March, 1812, incorporating the township of Moyamensing, the three commissioners elect, are not competent to take part in deciding on the validity of their own election. *The Commonwealth v. M' Closkey and others*, 369
2. It is illegal, under the provisions of that act, for the commissioners elect to be sworn in before their election has been returned and approved. *Ibid.*
3. Though the act of incorporation constitutes the commissioners whose term had not expired, judges of the election, and gives them full power and authority to approve thereof, or to set aside the same, and order a new election, as the law may require, yet the superintending jurisdiction of the Supreme Court is not thereby ousted; but they may inquire into the legality of the proceedings of the commissioners in setting aside an election, by granting an information in the nature of a writ of *quo warranto*, *Ibid.*
4. The commissioners have no right to set aside an election as to those persons who had a clear majority after deducting illegal votes, . . . *Ibid.*

ENCUMBRANCES.

See SHERIFF'S SALE, 1, 2, 3.

EQUITY.

See JUDGMENT, 3, 4, 5.

ERROR.

See AMENDMENT, 2. ARBITRATION, 2. REFERENCES, 1. REPLEVIN, 1. SURVEY.

1. The omission to charge the jury that a delay in bringing suit for any time short of that prescribed by the statute of limitations, is not a bar to the suit, when requested by counsel

to do so, is error. *Robeson v. Gibbons*, 45

2. It is error, when an action is brought for the use of another, and the nominal plaintiff dies, to swear the jury, and try the cause in the name of *cestui que use*. *Hess v. Hess*, . . 67
3. Where the injury complained of is a continuing one, and such continuance is the ground of a new action, it is error to lay in the declaration affirmatively, that any part of the injury accrued after the commencement of the suit. *Shaw v. Wile*, 280
4. But where the only act which is actionable, has passed before the writ issued, and the consequences of it, though continuing, are not the ground of a new action, it seems, the law is otherwise, . . . *Ibid.*
5. But if it be not, and the time is laid under a *videlicet*, or is insensible, or impossible, the error is cured by verdict, *Ibid.*

ESTATE FOR LIFE.

See COMMON RECOVERY, 3. DEVISE, 3.

EVIDENCE.

See AGREEMENT. BOND, 3. DEVISE, 2. PAROL EVIDENCE. PLEADING, 2. SEALED BILL, 2. SET-OFF, 2. TROVER, 1, 2, 3.

1. The docket of a justice of the peace, obtained from his office during his absence from the county, and proved to be in his handwriting, is evidence, although no *subpoena* has been taken out to procure his attendance. *Dennison v. Otis*, 9
2. A connected draft from the surveyor-general's office is evidence, not to make title, but to show whether there are any, and what interferences. *Robeson v. Gibbons*, 45
3. Where the question was whether a deed, an exemplification of which had been read in evidence, the original not being produced, was a forgery or not, held, that a book of accounts belonging to, and in the handwriting of the magistrate before whom the deed purported to have been acknowledged, and whose name appeared as a subscribing witness, containing charges against the grantor for the acknowledgment of three deeds only, which had certainly been acknowledged, before him, on the same day as that on

- which the deed in question purported to have been acknowledged, was competent evidence, the magistrate being dead, to show that that deed had not been acknowledged before him. *Nourse v. M'Cay*, . 70
4. It is no reason for rejecting evidence of a demand, that it is beyond the date prescribed by the act of limitations. *Boggs, Administrator of Boggs, v. Bard and others, Executors of Johnson*, 102
 5. Though deeds between other parties are not evidence, yet, they become so when referred to in an agreement between the parties. *Blair v. Hum*, 104
 6. On the plea and issue of *non damnificatus*, in a suit on a mortgage given to secure to the plaintiff the future conveyance by certain heirs to him, the plaintiff cannot give in evidence, to show the amount of damages he sustained, that he had, since the suit, purchased of the heirs, and the conveyance from them to him. *Sharple's v. Tate*, 108
 7. In an action brought by two administrators, with the will annexed, on a bond given to the testator, the defendant cannot, under the pleas of payment, with leave to give the special matter in evidence, and set-off, prove, that upon a settlement of the testator's estate, the debts had all been paid, and the legacies satisfied; and that the bond in question, with other moneys received by the administrators, remained to pay and satisfy the legacies and shares of the administrators in right of their respective wives; and that in consequence of the receipt of other large sums by one of the administrators, A., the said bond belonged to the other administrator, B.: That the defendant, before the suit was brought, had paid, as surety of B., sundry large sums on his account; and further, that B., before the commencement of the suit, had applied for, and obtained the benefit of the insolvent laws: That the defendant had been appointed his assignee, and regularly qualified as such. *Minch and another, Administrators of Cozier, v. Cozier*, 111
 8. A paper, found in the office of the deputy surveyor, proved to be in the handwriting of a former deputy surveyor, and purporting to be memoranda in relation to his official duty, concerning warrants, is good evidence. *Lindsay v. Scroggs*, . . 141
 9. Testator devised all his property, real and personal, to his two sons, H. and D., subject to the payment of certain legacies, and made H. and D. executors. They filed an inventory, amounting to two thousand six hundred and thirty-one dollars and fourteen cents, and went into possession together of the property. H. sold some of the personal property: D., in less than a year, moved to the western country. There was no sale by D., and the principal part of the property remained after D.'s removal: On an issue to try, whether part of the estate of the testator, amounting to ten thousand dollars, came into the hands of D., as surviving executor, and he was chargeable therewith, evidence on the part of the plaintiff, a legatee, is admissible to prove, that the defendant, D., is a creditor of the estate of H., his co-executor, (now deceased,) and the debt accrued by the transfer of the estate of the testator to H. by D., and that he claims to be first paid out of the funds of the testator. *Galbreath and others v. Rife, surviving Executor of Rife*, . . . 144
 10. The probate of a paper, purporting to be a will, before the register, indorsed thereon, may be read in evidence on the trial of an issue of *deviseavit vel non*, directed thereon by the Register's Court. *Sholly v. Diller*, 177
 11. The record of the forfeiture of a recognisance in the proper court, is conclusive evidence of the forfeiture, in debt on the recognisance. *Shriver v. The Commonwealth*, 206
 12. Declarations by a principal in a bond to a witness, in the absence of the surety, that a judgment note, which he gave him to deliver to the party was to secure him, accompanied by proof, that the note was delivered to the party, and he entered up judgment and collected moneys thereon, are good evidence as part of the *res gesta*. *Deardorf v. Hildebrand*, 226
 13. The certificate of a prothonotary, that a writ, declaration, or statement, cannot be found in his office, is admissible in evidence, to prove the loss of such papers. *Ruggles and others v. Gailey*, 232

14. The docket entries of a suit, appearance, plea, and issue, are admissible in evidence to show, that a suit has been brought; and whether the suit was an ejectment for a particular tract of land, may be proved by parol, *Ibid.*

EXECUTION.

See CONSTABLE. DEBTS. INSOLVENT DEBTORS, 3. JUDGMENTS, 2. SHERIFF'S AND CORONER'S SALES.

1. After a *feri facias*, levied on land and returned, grain was sown on it; and another creditor levied on the grain and sold it, and afterwards the land was sold on a *venditioni exponas*, issued on the first *feri facias*. Held, that the creditor who levied on the grain, had the right to hold the proceeds. *Stumbaugh v. Yeates*, . . . 161
2. If goods levied upon by the sheriff under a *feri facias*, be left in the defendant's possession, with the plaintiff's permission, and before the sale, a second execution be levied upon them, the lien of the first execution is not lost, unless there be fraud, which may be inferred from circumstances. *Howell v. Alkyn*, . . . 282

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION ACCOUNT, 1, 2. COSTS, 1, 2. DEBTS. EVIDENCE, 9. HEIRS. INTEREST. LEGACY, 3, 4. PURCHASER, 2. RENT, 3. SALE, 4, 5. SET-OFF, 1.

1. The proviso in the arbitration act, relative to appeals by executors and administrators, does not apply to cases in which they are sued for their own acts, even if they be done for the benefit of the estate; but to those alone in which they sue, or are sued, in their representative capacity. *Barnhart v. Painter*, 78
2. Where the debt to be recovered is assets, the plaintiff may name himself administrator, and sue as such on a contract made by him. *Boggs, Administrator of Boggs, v. Bard and others, Executors of Johnson*, . . . 102
3. An administrator who has paid money within the year to a creditor of the intestate, on account of a just debt, cannot recover it back, on the ground that, by reason of a deficiency in the assets, not arising from their accidental failure, it afterwards ap-

pears to have been an over-payment, by mistake. *Carson v. M'Farland*, . . . 118

4. Where a testator orders his property to be sold by his executors, after the decease of his wife, and the moneys arising therefrom to be divided among his children, and empowers them to rent the premises, if they cannot sell, a levy and sale of a share of the real estate, under a judgment against one of the children, does not pass any interest for such child therein. *Morrow, for the use, &c., v. Brenizer*, . . 185
5. An action for a legacy lies against an executor, in his individual capacity; so, of an action for a distributive share against an administrator, *Ibid.*
6. Still, the defendant is entitled to a refunding bond, *Ibid.*
7. An executor is chargeable as such, only on the engagement or covenant of his testator, *Ibid.*
8. It seems, an executor is within the purview of the acts to compel assignees to settle their accounts, empowering the court to displace a negligent trustee, and appoint another in his stead, *Ibid.*
9. It seems, that where an executor has settled his account, exhibiting a balance in his hands, he ceases to be a trustee, and becomes a debtor for such balance, to the legatees; and is, therefore, protected by the act of limitations. *App and another, Executors of App, v. Dreisbach*, 287
10. Still less can an executor be considered a trustee, not protected by the act of limitations, in respect of a sum of money, charged to be due from him, which, at the time of the settlement of his account, and ever afterwards, he denied to be due, *Ibid.*
11. Debt will not lie against an administrator here, on a judgment against a foreign administrator of the same intestate. *Brodie, Administrator of Lightfoot, v. Bickley, Administrator of Polgreen*, 431

FEME COVERT.

See NOLLE PROSEQUI.

FERI FACIAS.

See EXECUTION.

FOREIGN JUDGMENT.

See EXECUTORS AND ADMINISTRATORS, 11.

FORFEITURE.

See COMMON RECOVERY, 3.

FRAUD.

See EXECUTION, 2. NUISANCE, 2.

FRAUDS AND PERJURIES.

Part performance will take a parol contract out of the statute of frauds. *Muller v. Flower*, 53

GERMANTOWN AND PERKIO-MEN TURNPIKE ROAD.

See KENSINGTON DISTRICT.

GRANTOR AND GRANTEE.

See PURCHASE-MONEY.

GUARDIAN.

See APPRENTICE. INTEREST.

HEIRS.

1. An administrator who collects the rents and profits of the real estate of the intestate, holds them as trustee for the heirs, and not for the creditors. *M' Coy v. Scott*, 222
2. Until the right of the heirs is divested by a sale by the administrator under an order of the Orphans' Court, or by execution, the right of the heirs to the land is as absolute as that of their ancestor, *Ibid.*

HUSBAND AND WIFE.

A husband may petition the Orphans' Court in right of his wife, for the partition or valuation of his wife's estate, where her father dies intestate. *Eckert and another v. Yous's Administrator*, 136

INDICTMENT.

See WOODEN BUILDINGS.

INSOLVENT DEBTOR.

See BAIL.

1. J. L., being in custody, gave bond with surety, conditioned to appear, and "make application for the benefit of the several acts of assembly for the relief of insolvent debtors, and surrender himself to the jail of the county of C., in case, on his said application, the court should remand him to custody, and that he should do all things required by law to procure his discharge." Held, that this condition imposed no harder terms than the bond required by the act, and was substantially in conformity

with the law. *Lease and another v. Asper*, 182

2. Parol evidence is not admissible to show, that the Court of Common Pleas ought to have discharged a petitioner, instead of rejecting his petition, *Ibid.*
3. Where a defendant in custody on an execution, gives bond with surety to take the benefit of the insolvent laws, and forfeits his bond, a second execution may be issued against him. But if, when he is in custody under the second execution, the plaintiff discharges him from prison, without the assent of the surety, the debt is satisfied, and no action can be maintained against the surety upon the bond. *Paethorpe v. Leasher*, 272

INTEREST.

1. An executor or guardian is personally liable for interest which actually comes into his hands, and which he neglects to put out, or pay over, according to his duty; but he is not liable for compound interest. *English v. Harvey et al., Exrs. of Cox*, . . . 305
2. Therefore, where a testator directed, that nine thousand dollars should be put out by his executors at interest, for the benefit of a legatee, who was to be supported, and educated out of the interest, and that the surplus interest should be kept out at interest until the legatee should attain the age of twenty-one years; Held, that the executors were not personally liable for compound interest, . . . *Ibid.*
3. If a testator has in his lifetime put out the money bequeathed, at five per cent., and it does not become due until after his death, the legatee is only entitled to five per cent. until the money becomes payable, . . . *Ibid.*
4. And generally, if the testator directs money to be put out on land security, and no more than five per cent. can be obtained on such security, the executor is only answerable for the five per cent. received, *Ibid.*

JOINT BOND.

See BOND, 3.

JUDGMENT.

See EXECUTORS AND ADMINISTRATORS, 4, 11. MORTGAGE. PAROL EVIDENCE, 2. PURCHASER, 3. RESTITUTION, WRIT OF.

1. A written acknowledgment, of rec-

ord, by the defendant, that a judgment is in full force, is as effectual to keep it alive, as a *scire facias*. *Boal's Appeal*. 37

2. For the purpose of keeping a judgment alive by execution, it is immaterial whether the execution be issued before or after a year and a day from the entry of the judgment. . . . *Ibid.*
3. H. and M. were sureties for P., and M. paid half the debt, and joined H. in confessing a judgment to a creditor of P.'s for the other half, it being agreed H. should pay this judgment. M., however, was compelled to pay it: Held, that H.'s land being sold, by execution, M. had a right to come on the fund in the sheriff's hands, in preference to a subsequent judgment creditor of H. *Fleming v. Beaver*, 128
4. Actual payment discharges a judgment at law; but in equity, it may still subsist if the justice of the case requires it. *Ibid.*
5. An equitable right to such judgment may exist without any actual assignment of it. *Ibid.*
6. The lien of judgments, not revived within five years, is superseded by younger judgments duly revived, notwithstanding the death of the debtor after the judgments, where the moneys claimed arise from sales of lands in the county, which were bound by the judgments. *The Pennsylvania Agricultural and Manufacturing Bank v. Crevor*, 224
7. Query, how it would be if the funds are collected from lands in other counties, not bound by any of the judgments. *Ibid.*
8. A judgment confessed on an amicable *scire facias* on a former judgment, is a valid lien against subsequent incumbrancers, though the original judgment did not legally exist. *Ramsey v. Linn, Executor of Fleming*, 229

JURISDICTION.

See ELECTION, 2.

JUROR.

It is a good cause of principal challenge to a juror, that he has formerly acted as an arbitrator in the same cause. *Lloyd v. Nourse*, 49

JURY.

See APPEAL, 4. ERROR, 2.

JUSTICE OF THE PEACE.

See CERTIORARI. CONSTABLE. EVIDENCE, 1.

1. In a suit by the administrators of a constable against a justice of the peace, to recover back money alleged to have been received by him as a justice of the peace, by fraud and mistake, the justice is entitled to previous notice under the act of 1772. *Wise and another, Administrators, &c., v. Wills*, 208

KENSINGTON DISTRICT.

The eighteenth section of the act of assembly, incorporating the Kensington District of the Northern Liberties, which authorizes the commissioners to appoint one or more surveyors, who are required to survey and mark the lines of all the streets, &c., then open, and to lay out such other new streets, lanes, and alleys, &c., as they may deem necessary and convenient, for a regular town plan; and gave them power, for these and other purposes, to enter upon the lands of any person or persons within the district, extends to all property within the incorporated limits, whether held by individuals or corporations; and consequently, that part of the Germantown and Perkiomen Turnpike Road, which is within the district, came within the scope of the authority vested in the commissioners. *Case of the Plan of the Third Division of the District of Kensington*, 445

LEGACY.

See ATTACHMENT, FOREIGN.

1. Testator directs, that "the legacy coming to my daughter E., intermarried unto B. K., shall be lent out on interest, to support the said E. during her life; and after her death, if she die leaving no lawful children, her share, what is left, shall be equally divided amongst my children. And I do further order and bequeath unto my son-in-law B. K., the sum of five pounds, which shall be his share in full out of my estate. And it is further my will, and I do order, that the legacy coming unto my daughter M., intermarried unto J. W., shall be put out on interest for the support of her natural life, and after her death, if she dies without

- lawful heirs, shall be equally divided amongst my children, what is left. And I bequeath unto my son-in-law, J. W., the sum of five pounds, which shall be his share in full." Held, that the legacy coming to M. under this part of the will, on the death of E., is subject to the direction of the testator, to have it put out at interest, &c. *Wright and Wife v. Brother-ton and another*, 133
2. Testator bequeathed to his sons-in-law, J. and R., twenty thousand dollars, in trust, to place the same out at interest, and to apply the interest to the support and education of all the children of his son, H., born, and to be born, during their respective minorities; and to divide and pay the principal in equal parts and shares to the said children, when, and as they severally and respectively arrive at the age of twenty-one years. At the time of testator's death, his son, H., had five children, and afterwards, at the time the eldest child attained the age of twenty-one years, had five more; at which time the whole ten were living; and it was agreed he might have more. Held, that the principal of the legacy was to be divided among those children who were living at the time appointed by the testator for its distribution, in exclusion of those who might be born afterwards. *Heisse v. Markland, Executor of Heisse*, 274
3. If there be two executors, an action for a legacy must be against both; but if one has nothing in his hands, he may separately plead, *plene administravit*, and if it be found for him, judgment will be rendered in his favour. *App and another, Executors of App, v. Dreisbach*, 287
4. The third section of the act of the 21st of March, 1772, directing the court in which an action is brought for a legacy, to appoint auditors, on the plea of want of assets, does not authorize the auditors, in an action of *assumpsit*, to ascertain the amount of a residuary legacy. The legatee must compel the executor to a settlement in the Orphans' Court, and thus ascertain the amount, or bring an action of account render, in which a statement of all the assets will be exhibited, *Ibid.*
5. In determining whether a legacy is charged upon the land, in case of a deficiency of personal estate, the whole will must be taken together. *English v. Harvey and another, Executors of Cox*, 305
6. A legacy held to be a charge upon the land, from a view of the whole will, *Ibid.*
- ### LIEN.
- See COSTS, 1, 2. DEBTS, 2. EXECUTION, 2. JUDGMENT, 5, 6, 7. MECHANICS AND MATERIAL MEN. RESTITUTION, WRIT OF. SCIRE FACIAS, 2.
- The Court of Common Pleas have a right to appoint a commissioner to ascertain disputed liens, &c. *Werth v. Werth*, 151
- ### LIMITATIONS, ACT OF.
- See EVIDENCE, 4. EXECUTORS AND ADMINISTRATORS, 9, 10. SHERIFF, 2.
- The time required to bar a claim by the act of limitations, is not enlarged by a transfer of the claim. All the successive owners of it, have, together, only the time which the original claimant would have had. *M'Even and others v. Girard*, 311
- ### MARRIAGE SETTLEMENT.
- See MECHANICS AND MATERIAL MEN, 5.
- ### MECHANICS AND MATERIAL MEN.
- See LIEN.
1. On a sale of a building by virtue of a judgment and execution, mechanics' liens on the property are to be paid out of the purchase-money. *Werth v. Werth*, 151
 2. Where a person who is erecting a building, after having procured from a lumber merchant a certain quantity of lumber, becomes the owner of a note, payable in lumber, by the same lumber merchant, to a greater amount than the lumber furnished, and afterwards, more is furnished, exceeding in price the amount of the note, and a claim is filed under the mechanics' lien law, for the whole, the claim is, *pro tanto*, extinguished by the note; and the builder and lumber merchant cannot agree afterwards to apply the note to the credit of another building, subsequently erected by the same person, against which the lumber merchant has neglected to file a claim in due time, to the prejudice of a third person, who has

purchased the first house, before the commencement of the second. *Hopkins v. Conrad and Lancaster*, . 316

3. One who has conveyed a house with special warranty, and against whom, as the reputed owner, a claim is afterwards filed under the mechanics' lien law, is not a competent witness for his grantee, the real defendant, on the trial of a *scire facias* upon the claim, *Ibid.*
4. A., *cestui que trust*, tenant for life, under a post-nuptial marriage settlement, erected a building during her coverture, against which a person who furnished the bricks, filed a claim under the act of March 17th, 1806, "securing to mechanics and others, payment for their labour," &c. Upon this claim a *scire facias* was issued against A., and B., her husband, who was entitled to a contingent remainder for life under the settlement, and C., who, under the settlement, was trustee for A. and those in remainder and reversion. A., B., and C., appeared to the *scire facias*, and pleaded to issue; but before the trial A. died, and B., her husband, became tenant for life under the settlement. Held, that notwithstanding B. became entitled in remainder upon the death of A., the lien, created upon the building by filing the claim, continued to bind against the remainder men and reversioners, and was not confined in duration to the life interest of A., who erected the building. *Savoy v. Jones*, 343
5. The persons, or description of persons enumerated in the act of assembly of the 17th of March, 1806, "securing to mechanics and others payment for their labour," &c., are not alone entitled to the remedies provided therein; but any person, without distinction, employed in furnishing materials for, or in erecting or constructing any house, or other building, is within the meaning of the act, and may file a claim, and thereby affect the house or building, . *Ibid.*

MESNE PROFITS.

In an action of trespass for the mesne profits, the title of the plaintiff, who has recovered in ejectment, cannot be disputed. *Lloyd v. Nourse*, . 49

MILITIA.

See COURT-MARTIAL.

MISTAKE.

See BOND, 3.

MONEY, DISTRIBUTION OF.

See APPEAL. SHERIFF'S AND CORONER'S SALES.

MONEY HAD AND RECEIVED.

See PAROL EVIDENCE, 2.

MORTGAGE.

See SCIRE FACIAS, 1, 2. SHERIFF'S SALE, 1, 2, 3. WITNESS.

When land, subject to a mortgage, is sold under a judgment, obtained subsequently to the execution and recording of the mortgage, the purchaser at sheriff's sale, takes the land discharged of the lien of the mortgage. *Willard v. Norris*, 56

MOYAMENSING, TOWNSHIP OF.

See ELECTION.

NEW PROMISE.

A promise to pay a specialty debt, which has been discharged by a certificate of bankruptcy, does not revive the original debt, as a debt by specialty. The original debt is merely a consideration, which renders the new promise available. *Case of Field's Estate*, 351

NOLLE PROSEQUI.

In *assumpsit*, or other action upon contract against several defendants, the plaintiff cannot enter a *nolle prosequi*, as to one, unless it be for some matter which may be pleaded as a personal discharge. Thus, if a *feme covert* be one of the defendants, a *nolle prosequi* may be entered as to her. *Beidman and others v. Vander-slice and others*, 334

NOTICE.

See JUSTICE OF THE PEACE. SLAVE, 1, 2.

Notice given, agreeably to the rules of court, or by the directions of an act of assembly, is as effective and binding, as actual notice. *App and another, Ex'rs of App, v. Dreisbach*, 287

NUISANCE

1. An action on the case will lie for injury to land, however inconsider-

able, which is occasioned by a nuisance. *Alexander v. Kerr*, . . . 83

2. A. erected a mill and dam upon his own land, lying on Christine's creek. B., who then owned a tract of land lying higher up on the same creek, told A., at the time of erection, that he would sue A., should the dam injure his own land. B. afterwards lived on his tract four years, and never complained of any injury from the dam; but B. and C., to whom the tract was subsequently conveyed by B., said that they considered the dam a benefit. After the death of A., the mill was sold by his executors at public sale, and was purchased by the defendants. D., then owner of the aforesaid tract, by a prior conveyance from C., was present at the sale, but said nothing respecting the dam's being an injury to his land. D. afterwards conveyed to the plaintiff; who, at a subsequent period, but within twenty years from the erection of the mill, brought suit for injuries occasioned by the dam to his land: Held, that the preceding facts were no bar to his recovery, *Ibid*.

OATH OF OFFICE.

See COUNTY COMMISSIONERS. TREASURER, 4, 5.

OFFICERS.

See COUNTY RATES AND LEVIES.

The acts of public officers *de facto*, coming in by colour of title, are good so far as respects the public, but void when for their own benefit. *Keyser and others, Commissioners, &c., v. McKissan*, 139

OFFICIAL BOND.

See TREASURER, 4.

ORPHANS' COURT.

See HUSBAND AND WIFE. LEGACY, 4.

A decree of the Orphans' Court, confirming the settlement of an administration account, is conclusive, as to the items set out in it, and directly acted upon by the court. *App and another, Ex'rs of App, v. Dreisbach*, 287

PAROL CONTRACT.

See FRAUDS AND PERJURIES.

PAROL EVIDENCE.

See BOND, 3. EVIDENCE, 14. INSOLVENT DEBTOR, 2.

1. Parol evidence is not admissible to show the grounds of an order or decree of the Court of Common Pleas. *Gallagher, for the use, &c., v. Kenedy and another*, 163
2. In an action for money had and received, to recover money received by the defendant from the sheriff arising from the sale of the lands of a person against whom both the plaintiff and defendant had judgments, it is competent for the plaintiff to show, by parol evidence, that the defendant's judgment, which was the oldest, had been satisfied before the money came into the sheriff's hands: That it was kept on foot by covin and fraud, and that he (the plaintiff) was not a party to a rule entered in the suit in which the defendant's judgment was obtained, to show cause why that judgment should not be postponed, nor, to the following entry on the record made the next day, "settled by compromise between the parties." *Stahl v. Jarrett*, . 449

PARTNERS.

See PLEADINGS, 2.

If an individual enter into a contract with a company, doing business under articles of association, one of which provides for an application to the legislature for a charter, which is afterwards granted, the style and general organization of the association continuing the same, the responsibility of the company as partners is not changed by the act of incorporation, unless the express consent of the party who contracted with it be given, notwithstanding the act of incorporation declares that all contracts made by the association shall be as obligatory on the same, and on the other parties thereto, as if they had been made subsequently to the act of incorporation; and that it shall be lawful for the corporation and the parties to maintain actions to enforce the performance thereof, as fully and effectually as if the same had been made by or with the corporation. *Witmer and others v. Schlatter and others*, 359

PAUPER.

See SETTLEMENT.

PAYMENT.

See TREASURER, 5.

PENALTY.

See DAMAGES.

PLEADING.

See ERROR, 3, 4, 5. PRACTICE, 2.

1. A plea in abatement, alleging that there are others liable with the defendant, does not admit the existence of any contract whatever; the new parties being conditionally named, to enable the defendant to connect them with whatever contract may be proved. It operates no further than to preclude an objection for want of parties a second time; but the plaintiff is nevertheless bound to prove his case against all who are named, as if there never had been a proceeding to ascertain them. *Witmer and others v. Schlater and others*, 359
2. Against those who pleaded, the record is evidence that all who are alleged to be partners, are so in fact; but all others must be proved to be partners in the ordinary way, *Ibid*.

POOR, DIRECTORS OF THE.

See BOND, 1.

POSSESSION.

1. Possession of a farm draws to it the possession of the woodland belonging to it, though not inclosed; and the party in possession may maintain trespass against a wrongdoer for destroying timber in such woodland. *Penn v. Preston*, 14
2. The description, in a deed from the late proprietaries, of William Penn, as "the eldest son, and heir at law," of Richard Penn, although it might imply, that Richard Penn had other children, is not such a defect of title, as to preclude their recovery of the purchase-money of land sold by them, from one who has been in possession under such a deed for twenty-five or thirty years, . . *Ibid*.

POWER.

See DEVISE, 4. SALE, 5.

PRACTICE.

See NOLLE PROSEQUI.

1. Practice as to writs of error on awards of referees changed. Here-

after the court in which the cause is pending is to be resorted to for redress, in those cases in which heretofore writs of error were sustained to examine awards and proceedings of referees. *Sheetz v. Rudebaugh*, 149

2. Matters which would induce the court to stay proceedings on the bail bond, are not properly pleadable in bar. *King et al. v. The Bank of Gettysburg*, 197
3. If the defendant, after being arrested and giving bail bond, is discharged by the insolvent act, it is not necessary to enter special bail; the proper course is to enter a common appearance, *Ibid*.
4. In such case, the plaintiff cannot be subjected to delay, because he may enter judgment if there is no appearance, or demand a plea if there is. *Ibid*.
5. Query, whether the mere entry of an attorney's name on the margin of the docket, is a proper appearance in such case, *Ibid*.
6. A rule to take the depositions of ancient, infirm, and going witnesses, may be granted, after an appeal has been taken from the decision of a justice of the peace, but before a transcript of his judgment has been filed in the Court of Common Pleas. *Harlan v. Stewart, Administrator of Stewart*, 333

PRESIDENT JUDGE.

See COUNTY RATES AND LEVIES.

PRINCIPAL AND SURETY.

See INSOLVENT DEBTOR, 3.

PROMISE.

See NEW PROMISE.

PURCHASER.

See DEBTS, 2. SALE.

1. Where one conveys land which has been surveyed and returned, and describes it as land held on a warrant of a certain date, and in a certain name, all the land embraced by the survey passes, though the purchaser did not at the time of the sale know, that a certain part was included, and afterwards frequently spoke of it as the land of the seller; provided the interest of third persons be not affected by such declarations. *Anderson and another v. Nesbit and others*, . . 114

2. And this is more emphatically the case, where the seller is an executor, with power to sell, and has, through a mistake, in supposing it to be vacant land, cut off part of the testator's estate, and appropriated it to his own use, *Ibid.*
3. But it seems, that if the purchaser has got a title to such part, without having paid for it, he will be a trustee for those beneficially interested, *Ibid.*
4. A purchaser at sheriff's sale is not affected by any secret transfer by the defendant, by parol, previous to the judgment, particularly if the defendant was then in possession. *Clark v. Campbell*, 215
5. A purchaser at sheriff's sale is entitled to receive rent from the person in possession only from the time the sheriff's deed is acknowledged. *Scheerer v. Stanley*, 276

PURCHASE-MONEY.

See POSSESSION, 2. MECHANICS AND MATERIAL MEN.

If the grantee has sustained injury, from trespasses and otherwise, in consequence of not being furnished by the grantor with muniments of title, which he was bound to furnish, the court in an action for the purchase-money, should not instruct the jury to find a verdict for the defendant, but to make a deduction sufficient to cover the injury sustained. *Penn v. Preston*, 14

QUO WARRANTO.

See ELECTION, 2.

RATIFICATION.

See SALE, 4, 5.

RECOGNISANCE.

See APPEAL. EVIDENCE, 11.

RECORD.

See EVIDENCE, 11.

RECORDING ACT.

See COVENANT, 1, 2.

REFEREES.

See PRACTICE.

1. A court of error will not examine into the merits of a report of referees, under the act of assembly of 1705,

which has been confirmed by the court below. *Bellas v. Levy*, . . . 21

2. Costs may be given under the statute of Gloucester, by the court to which a report of referees is made, though not found by the referees, . . . *Ibid.*

REFUNDING BOND.

See EXECUTORS AND ADMINISTRATORS, 6.

If an action be brought for a legacy, without a refunding bond having been previously tendered, or filed, the defendant may plead the want of such bond in abatement, or, on the return of the writ, may move the court to abate it, or the court may stay proceedings till a reasonable indemnity be given. *Wood v. Davidson*, . . . 52

RENT.

See DISTRESS. PURCHASER, 4.

1. A plaintiff, in possession of the defendant's property, under a *liberari facias*, which has been set aside, and restitution awarded, though not actually made, cannot give an authority to another person, to collect from his tenant the balance of the rent due upon the lease. *Barnhart v. Painter*, 78
2. If the person under such alleged authority, distrain upon the tenant, and upon replevin brought, avow for rent in arrear, under the lease, he cannot justify the distress, by proving a parol lease, by himself to the tenant, *Ibid.*
3. Nor can he justify the distress, by asserting the character of administrator of the defendant in the *liberari facias*, *Ibid.*
4. A father agrees to convey land to his son for the sum of six thousand dollars, with certain reservations; by one of which the son engages, for himself and his assigns, to give to his father yearly, and every year, twenty bushels of wheat, twenty bushels of rye, and twenty bushels of corn; also, two good loads of hay, &c. A conveyance is made, referring to the articles, and possession taken by the son. Held, on a purchase of the son's estate, at sheriff's sale, that this is a rent, and the covenant to pay it runs with the land, and binds the vendee. *Herbaugh, Assignee of Zentmyer, v. Zentmyer*, 159

REPLEVIN.

1. If, in replevin for trees cut down

upon the plaintiff's land, the court be requested by the defendant to charge the jury, that if they believe he cut the trees in question, under a claim of property in the soil whereon they grew, the plaintiff is not entitled to recover; and it matters not, whether the claim were well or ill founded, it is sufficient to say, that if the jury believe that the defendant was in possession of the land from which the trees were cut, under a claim of title, the action could not be maintained; but if they believe he was not in possession, nor had either title, or claim of title, then the action was well brought, and the plaintiff was entitled to recover; and such answer is correct in point of law. *Snyder v. Vaux*, 423

2. If trees cut down upon the plaintiff's land be converted by the defendant into rails and posts, this is not such an alteration of the property as will prevent the plaintiff from recovering in replevin, *Ibid.*

REPORT OF REFEREES.

See PRACTICE. REFEREES.

RESTITUTION, WRIT OF.

- A writ of restitution on the reversal of an erroneous judgment, creates a lien on goods from the time it goes into the sheriff's hands, and on lands, from the time of the levy. *Boal's Appeal*, 37

ROADS.

1. The Court of Quarter Sessions, under the act of the 6th of April, 1802, have power to grant a review of a road, though two former sets of viewers have reported in favour of the road. *Case of a Road from the West end of Pomfret Street, &c.*, 124
2. Though road viewers are restricted to the space between the points specified in the order, yet they may carry the road to the point designated, partly over the bed of a road already laid out and opened. *Case of a Road from the West Chester Road, &c.*, 421

SALE.

1. If property be sold at public sale, on certain terms, one of which is, that on non-compliance with those

terms, the property shall be resold at the risk and expense of the purchaser, the second sale must not be clogged with terms likely to lower the price. *Paul and another, Executors of Paul, v. Shallcross*, 326

2. Query, Whether to make it a part of the conditions of the second sale that the balance remaining unpaid shall be secured by bond with warrant of attorney and mortgage, when the conditions of the first were, that it should be secured by bond and mortgage only, is not such an essential variance as will discharge the purchaser, *Ibid.*
3. If the seller and the person to whom the property was struck off at the first sale, enter into an agreement, before the second sale takes place, that the latter shall take the property at the price he before bid for it, but the agreement contains terms, in other respects, essentially different from those of the first contract, he cannot, on failing to comply with the second contract, be made answerable on the first, *Ibid.*
4. A sale of real estate by an executor, indirectly to himself, in pursuance of a power in a will, is not a good execution of the power, but the executor takes the estate clothed with the same trusts to which it was subject in his hands previous to the sale; and it matters not whether the executor made advantage by his purchase or not. *Bruch v. Lantz*, 392
5. Such a sale is not void, but voidable. It may be ratified by those who are entitled to call it in question; but a ratification by the heirs and devisees will not prevent the creditors of the testator from taking the land in execution as his estate, *Ibid*

SCHUYLKILL NAVIGATION COMPANY.

See APPEAL, 3, 4.

SCIRE FACIAS.

See JUDGMENT, 8.

1. Where land is mortgaged to secure an annual instalment, a *scire facias* cannot issue as each instalment becomes due; the party must bring ejectment, or proceed on the accompanying bond. *Fickes with notice, &c., v. Ersick*, 166

2. Query, whether a mortgage to secure an annual sum during life, is necessarily a lien, subject to which the land must be sold on a *scire facias*, *Ibid.*

SEALED BILL.

1. A sealed bill, given by a party in the custody of a constable, for the purpose of settling a proceeding against him on a charge of killing some of his neighbour's cattle, is good, if no fraud or misrepresentation have been used. *Hays v. Lusk*, 24
2. If the bill express, that it is to be paid at a given time, if the obligor "cannot make it appear, that no person else committed the trespass," it does not throw the burden of proof on the obligee, *Ibid.*

SET-OFF.

1. Defendants sued on a bond given by them to executors, for a debt due the testator may set off a debt due to one of them, (he being the principal, and the other defendant surety,) by the testator, for work done. *Crist and another v. Brindle and another*, 121
2. Evidence is admissible on behalf of the defendants in such suit that, at a former trial, on another bond, the set-off was not allowed, because the counsel for the plaintiffs agreed, that it should be admitted on the present bond, *Ibid.*

SETTLEMENT.

See MECHANICS AND MATERIAL MEN, 5.

The settlement of a pauper can only be decided by two justices, or a Court of Quarter Sessions on an appeal. It cannot be collaterally determined in an action before a single justice, or in a court of law. *Overseers of Point Township v. Overseers of Lycoming Township*, 26

SHERIFF.

See PAROL EVIDENCE, 2.

1. The sheriff cannot call upon the county commissioners to refund the daily sum he has paid the crier of the court. *Commissioners of Mercer County v. Patterson*, 106
2. The statute of limitations would apply to such claim, if legal, . . . *Ibid.*

SHERIFF'S AND CORONER'S SALES. DISTRIBUTION OF MONEY ARISING FROM.

See APPEAL.

Where the sheriff sells personal property as the goods and chattels of the defendant in the execution, which are claimed by another, the court out of which the execution issues, cannot, under the act of the 16th of April, 1827, determine to whom the property belonged, and award the money accordingly. The remedy of the claimant of the goods is, by action against the plaintiff in the execution, or the officer, or both. *Walters v. Pratt*, 265

SHERIFF'S DEED.

See PURCHASER, 4.

SHERIFF'S SALE.

See EXECUTORS AND ADMINISTRATORS, 4. MORTGAGE. PAROL EVIDENCE, 2. PURCHASER, 3, 4. SHERIFF'S AND CORONER'S SALES.

1. If neither the levy on land, by virtue of an execution, nor the sale, nor deed, is made subject to any incumbrance, no loose talk among the bystanders at the sale, no whispers or insinuations by strangers, can affect the land, in opposition to the record, and the acts and declarations of the sheriff at the time of sale, unless in cases of fraud. *Fickes, with notice, &c., v. Ersick and another*, 166
2. Query, whether, if land is levied on and sold, expressly subject to an incumbrance, it is good, . . . *Ibid.*
3. It seems, that either the plaintiff or defendant may have such levy or sale set aside, *Ibid.*

SLAVE.

1. Defects in the return of a slave may be supplied by the registry of the clerk. *Jacob v. Pierce, Executor of Jacob*, 204
2. A discharge of a person by *habeas corpus*, who was claimed as a slave, is not to affect one who warranted the title as a slave, unless he had notice of the proceeding, . . . *Ibid.*
3. Such notice should be actual on the person, and not constructive, . . . *Ibid.*

SUPREME COURT.

See ELECTION, 2.

SURETY.

See BOND, 3. INSOLVENT DEBTOR, 3.
JUDGMENT, 3, 4, 5.

SURVEY.

See EVIDENCE, 2. PURCHASER, 1, 2.
SURVEYOR.

A subsequent survey cannot affect a prior one, regularly made and returned; and if the court be requested by counsel to charge the jury to this effect, and refuse to do so, it is error. *Robeson v. Gibbons*, 45

SURVEYOR.

If a deputy surveyor has included too much land within the lines of a survey, he cannot, without the knowledge and consent of the party for whom it was made, throw out a part, including cleared fields, and the best land. If he do so, the party injured is bound to apply for redress to the Board of Property, and obtain a resurvey. But if, after the survey is returned, and before application for redress is made, any third person acquires a right to the land thrown out, by actual settlement, or the purchase of a warrant, the party injured by the act of the deputy surveyor, cannot, especially if his application for redress has been long delayed, recover against such third person. *Ruggles and others v. Gaily*, . . . 232

TAXES.

See COUNTY RATES AND LEVIES.

The borough of Chambersburg, under a power given by the act of assembly to assess, apportion, and appropriate such taxes as shall be determined by a majority of them, necessary for carrying their rules and ordinances into complete effect, provided, no tax shall be laid in any one year, on the valuation of taxable property, exceeding one cent in the dollar, has power to assess single men, without property, inhabitants of the borough. *Hoeflick v. Snyder*, 126

TREASURER.

1. A county treasurer's account, settled under the provisions of the act of assembly of the 30th of March, 1791, may be altered by the auditors,

at any time before it is returned to the Court of Common Pleas. *Brown v. The Commonwealth*, 40

2. A treasurer of a county is not entitled to compensation for travelling out of the county to collect taxes on unseated lands, *Ibid.*
3. If the auditors proceed to settle the account without giving notice to the treasurer, and their report be filed, no appeal entered, and an execution issued, the court, on application, will set the report aside; but, if the treasurer enter an appeal, and the whole matter is taken up anew in the court, the defect is cured, *Ibid.*
4. It is no defence for a treasurer, in a suit by the commissioners on his official bond, that the commissioners have not taken an oath of office. *Keyser and others, Commissioners, &c., v. M'Kissan*, 139
5. A payment to a county treasurer, who has not taken the oath of office, by his predecessor, is a legal payment, *Ibid.*

TRESPASS.

See COURT-MARTIAL. POSSESSION, 1.

TROVER.

1. In an action of trover brought by administrators for certain bonds, given to the intestate by the defendant, who refused to surrender them, on the ground that they had been given up to him by the intestate, who was his father, the declarations of the intestate, made in the absence of the defendant, tending to negative the allegation of the defendant, were held not to be admissible in evidence. *Romig, Adm'r of Romig, v. Romig*, 241
2. In trover for bonds, the measure of damages is the amount which may be recovered on them, *Ibid.*
3. Therefore, where an intestate had agreed to convey to the defendant a tract of unpatented land, by "a good deed, or lawful conveyance," and bonds were given for the consideration-money, which bonds afterwards came into the hands of the defendant, in an action of trover for the bonds, by the intestate's administrators, the defendant may prove, by way of defence, that he paid for patenting the land, for the funeral expenses of the intestate, and that he had worked for the intestate, who

had promised to pay him for his services, *Ibid.*

TRUST.

See DEBTS. SALE, 4, 5.

TRUSTEE.

See EXECUTORS AND ADMINISTRATORS, 9, 10. PURCHASER, 3.

VENDITIONI EXPONAS.

See EXECUTION.

VERDICT.

See PURCHASE-MONEY.

A verdict in debt, finding no specific sum, is void. *Miller v. Hower*, . 53

VIEWERS.

See ROADS.

WARRANTY.

See SLAVE, 2, 3.

WARRANT AND SURVEY.

See SURVEYOR.

WAIVER.

See APPEAL, 2.

WILL.

See DEVISE. EVIDENCE, 10. EXECUTORS AND ADMINISTRATORS, 4. LEGACY.

WITNESS.

See MECHANICS AND MATERIAL MEN, 3. PRACTICE, 6.

1. In an action on a bond, accompanied by a mortgage, a subsequent mortgagee is a competent witness for the defendant. *Euters v. Peres and another, Executors of Peres*, . . . 279
2. *Aliter*, where suit is brought upon the mortgage, *Ibid.*

WOODEN BUILDINGS.

1. To elevate and enlarge a wooden building, so as materially to alter its character, is an offence within the meaning of the ordinance of the 6th of June, 1796, "to prevent the erection of wooden buildings within certain limits of the city of Philadelphia," *Douglass v. The Commonwealth*, 262
2. In an indictment under this ordinance, it is not necessary to aver, that the building was erected on a lot or piece of ground, . . . *Ibid.*
3. An indictment containing two counts, one charging the defendant with the erection of a wooden shop, the other with the erection of a warehouse, does not set forth distinct offences, punishable in different modes, *Ibid.*
4. If the erection be by the tenant, an indictment will lie against him, and need not be against the owner of the building, *Ibid.*

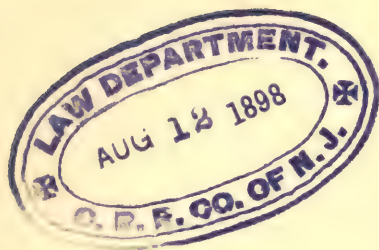
WOODLAND.

See POSSESSION, 1.

WRIT OF ERROR.

See PRACTICE.







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